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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1935

## No. 599

EDWARD A. LEAHY, PETITIONER,

*vs.*

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1935.

CERTIORARI GRANTED JANUARY 6, 1936.

# SUPREME COURT OF THE UNITED STATES

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[fol. a] **IN SUPREME COURT OF OKLAHOMA**

[File endorsement omitted]

No. 24635

EDWARD A. LEAHY, Plaintiff in Error,

v.

STATE TREASURER OF OKLAHOMA; RAY O. WEEMS, as State Treasurer; OKLAHOMA TAX COMMISSION, MELVEN CORNISH, W. D. HUMPHREY and JOHN T. BAILEY, as Members of the Oklahoma Tax Commission, Defendants in Error.

PETITION IN ERROR—Filed April 25, 1933

Comes now the above-named plaintiff in error and respectfully shows to the court that heretofore he filed his petition in the District Court of Osage County, Oklahoma, asking for judgment against the State Treasurer of Oklahoma, Ray O. Weems, as State Treasurer, and the Oklahoma Tax Commission, and Melvin Cornish, W. D. Humphrey, and John T. Bailey, as members thereof, in the sum of $11.99, the same being the amount paid by him to the State Treasurer as income tax for the year 1932, and at the time of payment of which he filed with the State Treasurer above-named and the Oklahoma Tax Commission above-named, notice that he would, within thirty days from the date of the payment of said tax, bring an action to recover the same; that, thereafter, the defendants in said action moved to remove the said cause to the District Court of Oklahoma County, and the same was, by order of the District Court of Osage County, removed to Oklahoma County; that the basis and grounds for the recovery of said tax was and is that this plaintiff in error is a member of the Osage tribe of Indians, duly enrolled as such, and [fol. b] that the income upon which said tax was based was income which he received as a member of the Osage tribe of Indians from the mineral resources of said tribe, as provided by the Act of Congress of June 28, 1906 (34 Stat. L. 539); that issues were joined in the district court and the allegations of plaintiff's petition with reference to the source of the income upon which the tax was based was

admitted, but the defendants alleged that this plaintiff in error was the holder of a certificate of competency, and did have such certificate of competency prior to the year 1932.

By way of reply, this plaintiff in error admitted that he did have a certificate of competency, and that the same was issued to him prior to the first day of January, 1932.

The cause came on for hearing before the District Court of Oklahoma County on the 28th day of March, 1933, upon stipulation between the parties that the court might render judgment upon the pleadings, without the taking of any evidence, (See case-made at page 42), and the court held in favor of the defendants and against the plaintiff.

Motion for a new trial was filed (see case-made page 46), and the same was overruled and journal entry of judgment entered (see case-made page 48).

The plaintiff in error complains of the judgment of the court in the matter, and alleges that the trial court committed error in the following particulars:

First: In overruling the motion for a new trial of the plaintiff in error.

Second: That the judgment and decision of the court rendered is contrary to law in that, under the Acts of Congress relating to the Osage tribe of Indians and the various [fol. c] treaties between the United States of America and the Osage tribe of Indians, the source of the income of the plaintiff in error was a trust property, held by the United States for the use and benefit of the Osage tribe of Indians, and, being a trust property, is not, under the constitution and laws of the United States and the various treaties between the United States and the Osage tribe of Indians, subject to taxation, and the income from the same is not subject to taxation, and the judgment and order of the district court is, therefore, in conflict with, and contrary to, the constitution and laws of the United States of America.

Third: That the judgment of the court is contrary to the facts as set out and stated in the pleadings.

Fourth: That the court erred in not rendering judgment in favor of the plaintiff and against the defendants in said action.

The transcript and case-made in said cause is hereto attached, made a part hereof, and marked "Exhibit A."

Wherefore, the plaintiff in error prays the court that the judgment and order of the District Court of Oklahoma County, Oklahoma, in this case be reversed and set aside, and that the said court be ordered and directed to enter judgment in favor of this plaintiff in error and against the defendants in error.

Leahy, Macdonald & Files, of Pawhuska, Oklahoma, Attorneys for Edward A. Leahy, Plaintiff in Error.

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[fols. 1-3] [Caption omitted]

[fol. 4] IN DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

No. 14,917

EDWARD A. LEAHY, Plaintiff,

vs.

STATE TREASURER OF OKLAHOMA; RAY O. WEEMS, as State Treasurer; Oklahoma Tax Commission; Melven Cornish, W. D. Humphrey, and John T. Bailey, as Members of the Oklahoma Tax Commission, Defendants

PETITION—Filed Oct. 10, 1932

Comes now the above named plaintiff, and, for his cause of action against the above named defendants, and each of them, says:

I

That he is a member of the Osage Tribe of Indians, duly enrolled and allotted as such, under the Act of Congress of June 28, 1906 (34 Stat. L. 539), opposite the number 1437 of said tribe.

II

That on the 12th day of September, 1932, he filed with the Oklahoma Tax Commission, one of the above named defendant, an income tax return for the year 1931, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof;

That on the same day he served notice upon the State Treasurer of Oklahoma that he had on said date paid the tax in accordance with the said income tax return, and that [fol. 5] he claimed said tax was not due, and that it was erroneously and illegally collected, and that within thirty days from that date he would file a suit to recover said tax, a copy of which notice is hereto attached, marked "Exhibit B", and made a part hereof;

That on said 12th day of September, 1932, he also served notice upon the Oklahoma Tax Commission, one of the above named defendants, that he had filed said tax return and had paid the tax in accordance with said return, and that he claimed that the same was illegally and erroneously collected, and that he would within thirty days from said date file suit in a proper court for a recovery of the same, a copy of which notice to the Oklahoma Tax Commission is hereto attached, marked "Exhibit C", and made a part hereof.

III

Plaintiff further says that that portion of the income shown on said return as income as a member of the Osage Tribe of Indians from the tribe's mineral resources came to him by reason of his membership in the Osage Tribe of Indians, and was paid to him by the disbursing agent of the Osage Indian Agency, under authority and direction from the Secretary of the Interior of the United States of America;

That as shown on said return he deducted as depletion on said $860.00, twenty-seven and one-half (27½%) per cent. of the same, or $260.44, leaving a total of $599.56 which this plaintiff claims was not subject to income tax, for the rea- [fol. 6] sons set out herein, and that the same was illegally and erroneously collected from his by the State Treasurer of Oklahoma and the Oklahoma Tax Commission, the above named defendant.

Plaintiff further says that the amount of tax erroneously and illegally collected, and paid by him, as set forth, on said sum of $599.56, was the sum of $11.99, and that he is entitled to a return of the same.

IV

Plaintiff further says that income received by him as a member of the Osage tribe of Indians from the

mineral interests or rights of the Osage tribe of Indians is not subject to the payment of state income tax, for the reason that the United States holds in trust for the use and benefit of the Osage tribe of Indians and the members thereof all of the mineral resources belonging to the Osage tribe of Indians situate in Osage County, Oklahoma;

That said minerals are held in trust for the Osage tribe of Indians by the United States, as aforesaid, under and by virtue of certain acts of Congress, to-wit:

The Act of Congress of July 15, 1870 (10 Stat. L. 335),

The Act of Congress, approved June 5, 1872 (17 Stat. L. 228),

The Act of Congress of March 3, 1873, (17 Stat. L. 530),

The Act of Congress, approved March 3, 1883 (22 Stat. L. 603),

[fol. 7] and under and by virtue of a certain deed made and executed by and between the Cherokee Tribe of Indians or the Cherokee Nation, by and through Dennis W. Bushyhead, Principal Chief, Richard M. Wolf and Robert B. Ross, delegates of said Cherokee Nation, as grantors, and the United States of America, in trust for the use and benefit of the Osage Tribe of Indians, as grantee, which said deed was made and executed, as aforesaid, on the 14th day of June, A. D., 1883, in accordance with the terms and conditions of the said last two above referred to acts of Congress, a copy of said deed, so made and executed by and between the Cherokee Tribe of Indians or the Cherokee Nation, and the United States, is hereto attached, marked "Exhibit D" and made a part hereof; and further, by reason of an Act of Congress approved June 28, 1906 (34 Stat. L. 539), which said last quoted act of Congress provides for the division and allotment of the lands and funds of the Osage Tribe of Indians in Oklahoma Territory, and for other purposes, and makes provision for the allotment of the lands of the Osage Indian Reservation to the members of the tribe thereof, and provides for the distribution of other property belonging to the said Osage tribe of Indians, and especially provides, among other things, that the oil, gas, coal and other minerals, covered by said lands, shall not be allotted to the individual members of said tribe, but shall be reserved to the use of said tribe for a period of twenty-five years, the royalties from said minerals to be paid to said tribe as provided in said act; and also under

[fol. 8] the Act of Congress of March 3, 1921 (41 Stat. L. 1249), which is an act to amend section 3, of the Act of Congress of June 28, 1906 (supra), and for other purposes, wherein it is provided that the reservation to the Osage Tribe of the oil, gas, coal, and other minerals covered by the lands for the selection and division of which provision is made in the act of June 28, 1906, are reserved to the Osage tribe for the period ending April 8, 1946, and also by virtue of the Act of Congress of March 2, 1929 (45 Stat. L. 1478), which specifically further provides for the reservation to the Osage tribe of Indians of said oil, gas, coal, and other minerals until the 8th day of April, 1958.

V

That, under and by virtue of said acts of Congress and said trust deed, heretofore referred to, the United States, through the Secretary of the Interior, distributes quarterly to the members of the Osage Tribe of Indians the proportionate share of each of said members of the funds accumulated to the tribe for the previous quarter, after making certain deductions for expenses of tribal government, as provided in said acts of Congress; and that said amount of $860.00, hereinabove referred to and set out in "Exhibit A" was money paid to this plaintiff as a member of the Osage tribe of Indians, as above set forth, during the year 1931, and that said minerals held in trust by the United States for the use and benefit of the Osage tribe of Indians, constitute a governmental agency, through which the United [fol. 9] States carries out its various treaty obligations to the Osage tribe of Indians and the duties imposed upon it by reason of said acts of Congress and also gives to the Osage tribe of Indians and the members thereof that protection and benefit which is intended by reason of said treaties and said acts of Congress, and that, for that reason, said income is not subject to be taxed by the State of Oklahoma, and the collection of said tax by the State Tax Commission from this plaintiff was in violation of his legal rights and contrary to the treaties and acts of Congress above referred to, and the policy of the United States in looking after and protecting the interests of the said Osage tribe of Indians and the members thereof, and was, therefore, illegal, and this plaintiff is entitled to the return of

that portion of the tax paid on his proportion of the income of the Osage tribe of Indians as hereinabove set forth, in the amount of $11.99.

VI

Plaintiff further says that, upon payment of the amount shown in "Exhibit A" to the state Tax Commission, to wit, $13.85, the said Tax Commission issued to the plaintiff its receipt therefor, a copy of which is hereto attached, marked "Exhibit E" and made a part hereof.

VII

Plaintiff further says that, under the laws of this state, when notice is served upon the State Treasurer and the State Tax Commission that the taxpayer will bring suit [fol. 10] within thirty days in a court of competent jurisdiction to recover the amount of the tax paid, it is the duty of the State Treasurer to withhold said money from the general funds of the state, and to place the same in a special fund to await the result of such action, if commenced, and that by reason thereof the State Treasurer now has said amount of $13.85 in his possession to await the result of this suit.

Wherefore, this plaintiff prays the judgment of this court against the said State Treasurer and the Oklahoma Tax Commission, for an- on account of the reasons hereinbefore set forth, in the sum of $11.99, and for an order directing the said State Treasurer to return said amount to this plaintiff, and for his costs in this behalf expended, and for such other and further relief to which he may be entitled.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

*Duly sworn to by Edward A. Leahy. Jurat omitted in printing.*

[fol. 11] EXHIBIT "A" TO PETITION

File this return with the Oklahoma Tax Commission on or before March 15, 1932.

Receiving Stamp.

State of Oklahoma

Individual Income Tax Return for the Calendar Year 1931

Do not fill in.

Audited by —— ——.

For net incomes of not more than $5,000, derived chiefly from salaries and wages.

Date received —— —, ——.
Date Completed —— —, ——.

If income is derived, regardless of the amount, from a profession or business, including farming, or from rents or sale of property, use form 511.

Remarks ——.

Print name and address plainly

Name: Edward A. Leahy.
Occupation: Student.
Street and No. or R. F. D.: 319 East Main.
City or town: Pawhuska.
[fol. 12] $——.
Serial No. ——. County: Osage. State: Okla.

1. Of what state are you a resident? Okla.
2. Did you file an Oklahoma Income Tax Return for 1930? No.
3. Give former address if different from that shown on last years return ——.
4. Were you married and living with wife (or husband) on December 31, 1931? No.
5. Did your wife (or husband) derive income during 1931 from sources independent of your own? ——.
6. If so, has such income been included herein? ——.
7. If not, separate return is made, give full name of wife (or husband) ——.

8. Were you the head of a family? That is, regardless of marital status, were you, on December 31, 1931, supporting, in your household, maintained by you, one or more dependent members of your immediate family? No.

9. How many dependents were receiving their chief support from you on December 31, 1931? None.

10. In blank, on reverse side, give names, ages, and relationship to you of each individual included in your answer to Question 9.

11. Did you file a Federal Income Tax Return for 1931? No.

12. Did you receive any income not reported herein? No.

If so, fill in Schedule C on reverse side.

[fol. 13] Schedule A—See Instructions

| | |
|---|---|
| 1. Salaries, Wages, Commission, Bonuses, etc. (State name and address of employer: —— | Amount |
| (a) —— | |
| (b) —— | |
| (c) —— | |
| 2. Other Income (give details) | |
| (a) Interest on loan to T. J. Leahy | $843.42 |
| (b) Income as member of Osage tribe from tribe's mineral resources | 860.00 |
| 3. Total income (Total lines 1 and 2) | $1,703.42 |

Deductions

| | |
|---|---|
| 4. Interest paid | |
| 5. Taxes paid (not including Federal Income or for Special Improvements) | |
| 6. Federal income taxes paid on income derived from Oklahoma | |
| 7. Bad debts (itemize) | |
| 8. Contributions (itemize) | |
| 9. Other deductions authorized by law (itemize) 27½ per cent depletion on tribal income | 260.44 |
| 10. Total deductions (Total lines 4 to 9) | |
| 11. Net income (Line 3 minus line 10) | $1,442.98 |

## Computation of the Tax

| | |
|---|---|
| 12. Net Income (from line 11) | $1,442.98 |
| 13. Less: Personal Exemption | 750.00 |
| [fol. 14] 14. Credit for dependents. | |
| 15. Total exemptions (Total lines 13 and 14) | $750.00 |
| 16. Net amount subject to tax (line 12 minus line 15) | 692.98 |
| 17. Total income tax (2% of amount shown in line 16) | 13.85 |

## Affidavit

STATE OF ——,
County of ——, ss:

I, Edward A. Leahy, being first duly sworn, depose and say that this return has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith, for the taxable year as stated.

Edward A. Leahy.

11 day of September, 1932.

Johnnie Mohon, Notary Public. (Seal.)

My commission expires Oct. 26, 1933.

This return was prepared by ——.

Follow instructions carefully. Answer each question fully.

Schedule B—for use in itemizing deductions (see Instructions).

Schedule C—For use in reporting income not shown in schedule A—See Instructions.

Character of Income From what source Amount.

[fol. 15] List of Defendants—See Instructions

| Name in Full | Relationship | Age | Name in Full | Relationship | Age |
|---|---|---|---|---|---|
| ..... | ..... | ... | ..... | ..... | ... |
| ..... | ..... | ... | ..... | ..... | ... |

EXHIBIT "B" TO PETITION

Instructions

To the State Treasurer of Oklahoma:

The undersigned, Edward A. Leahy, hereby notifies you that he has this day paid to you state income tax for the year 1931, in the amount of $13.85, and that he claims said tax not due, and erroneously and illegally collected, and you are hereby notified that he will, within thirty days, file suit to recover said tax, on the grounds and for the reason that the same is not due the State of Oklahoma, because it is a tax on income received by him as a member of the Osage Tribe of Indians, representing his share in the tribal income from the mineral resources of said tribe.

Dated this 12th day of September, 1932.

Edward A. Leahy, by T. J. Leahy, His Attorney.

Receipt of the above notice is hereby acknowledged this 12th day of September, 1932.

Ray O. Weems, State Treasurer of Oklahoma, by Hugh L. Harrell, Asst.

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[fol. 16] EXHIBIT "C" TO PETITION

To the Oklahoma State Tax Commission:

You are hereby notified that the undersigned, Edward A. Leahy, has this day paid the state income tax for the year 1931 in the amount of $13.85; that he is a member of the Osage Tribe of Indians, duly enrolled as such, and that he claims said tax not due to the State of Oklahoma, and erroneously and illegally collected, because it represents tax on income derived from his share of the income of the Osage Tribe of Indians from its mineral resources, and that he will, within thirty days from this date, file suit for the recovery of the same.

Dated this 12th day of September, 1932.

Edward A. Leahy, by T. J. Leahy, His Attorney.

Receipt of the above notice is hereby acknowledged this 12th day of September, 1932.

Oklahoma State Tax Commission, by Melven Cornish.

EXHIBIT "D" TO PETITION

This Indenture made and entered into this fourteenth day of June A. D. eighteen hundred and eighty three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said [fol. 17] Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians of the second part, Witnesseth: that,

Whereas by the sixteenth article of the treaty concluded July nineteenth, A. D. eighteen hundred and sixty six, between said Cherokee Nation and the United States, the said United States acquired the right "to settle friendly Indians on any part of the Cherokee Country west of the ninety six degree" of west longitude, under certain limitations therein mentioned, and

Whereas under authority of an Act of Congress approved June Fifty, A. D. eighteen hundred and seventy two, a certain tract of said country was set apart for the Great and Little Osage tribe of Indians, with a proviso that said Great and Little Osage tribe shall permit the settlement within the limits of said tract of the Kansas tribes of Indians; and

Whereas by virtue of a provision in the act of Congress of March third, eighteen hundred and seventy three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of one million, ninety nine thousand, one hundred and thirty seven and forty one hundredths dollars $1,099,137.41) in payment for said tract of land; and

Whereas by an Act of Congress, approved March third A. D. nineteen hundred and eighty three, three hundred [fol. 18] thousand dollars ($300,000) was appropriated "to be paid into the treasury of the Cherokee Nation out of funds due under appraisement for Cherokee lands west of the Arkansas River" provided "that the Cherokee Nation through its proper authorities shall execute conveyances satisfactory to the Secretary of the Interior, to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying said tract as they respectively occupy the same, before the payment of said sum of money;" now,

Therefore by authority of an Act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty three, which recites "That Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of the Cherokee Nation, are hereby authorized and empowered, in the name of the Cherokee Nation, to execute deeds of conveyance as required by said Act, March third, eighteen hundred and eighty three, for the tracts of Cherokee land for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages, as they respectively occupy the same," said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, and of the further sum paid under the Act of March third, [fol. 19] eighteen hundred and seventy three, as aforesaid, does by these present- bargain, sell, remise, release, relinquish, and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory embracing the following townships and fractional townships north, and east of the Indian Merid-an—the fractional townships being on the left bank of the Arkansas River:

Fractional townships twenty-four (24), twenty-five (25) and twenty-six (26), range two (2) east;

Fractional townships twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and twenty-nine (29), range three (3) east;

Fractional townships twenty-three (23) twenty-four (24), twenty-five (25), twenty-six (26) and twenty-seven (27) township twenty-eight (28) and fractional township twenty-nine (29), range four (4) east;

Fractional townships twenty-three (23) and twenty-four (24), townships twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), and fractional township twenty-nine (29), range five (5) east;

Fractional townships twenty-two (22) and twenty-three (23), townships twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29), range six (6) east;

[fol. 20] Fractional townships twenty-one (21) and twenty-two (22), townships twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29), seven (7) east;

Fractional townships twenty-one (21) and twenty-two (22), townships twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29), range eight (8) east;

Fractional townships twenty (20) and twenty-one (21), townships twenty-two (22) twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29), range nine (9) east;

Fractional township twenty (20), townships twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29) range ten (10) east;

Fractional township twenty (20), townships twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and fractional township twenty-nine (29), range eleven (11) east;

Fractional townships twenty (20), twenty-one (21), [fol. 21] twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28) and twenty-nine (29), range twelve (12) east (according to a plat of lands annexed hereto, marked "A", and made a part of this conveyance; containing in all one million five hundred and seventy thousand, one hundred and ninety-six and thirty-hundredths acres (1,570,196.30) hereby granted). Under the act aforesaid, there has been set apart for the Kansas Indians, as provided by said act, the following numbered townships and fractional townships, being a part of the lands above described, and indicated upon the beforementioned plat;

Fractional townships twenty-seven (27), twenty-eight (28) and twenty-nine (29), range three (3) east;

Fractional township twenty-seven (27), township twenty-eight (28) and fractional township twenty-nine (29), range four (4) east;

The west half of sections three (3), ten (10), fifteen (15), twenty-two (22), twenty-seven (27) and thirty-two (32), and sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty (30) and thirty-one (31), of township twenty-seven (27) north, range five (5) east;

The west half of sections three (3), ten (10), fifteen (15), twenty-two (22), twenty-seven (27) and thirty-four (34), [fol. 22] and sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32) and thirty-three (33), of township twenty-eight (28) north, range five (5) east;

The west half of sections fifteen (15), twenty two (22), twenty seven (27) and thirty four (34), and sections sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty one (21), twenty eight (28), twenty nine (29), thirty (30), thirty one (31), thirty two (32) and thirty three (33), of township twenty nine (29) north, range five (5) east; containing an area of one hundred thousand one hundred and thirty seven and thirty two hundredths acres (100,137.32), which aforesaid lands were paid for by the Osages to the Cherokees, and the Kansas Indians have paid for that portion assigned to them by proper transfer of the funds arising from the sale of their lands in Kansas, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining to the lands hereby granted:

To have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid.

In witness whereof the party of the first part hath subscribed this conveyance by the said principal chief and [fol. 23] delegates, aforesaid, who have also hereunto set their hands and seals this fourteenth day of June A. D. eighteen hundred and eighty three.

The Cherokee Nation, by Dennis W. Bushyhead, (L. S.) Principal Chief. Richard M. Wolfe, (L. S.) Robert B. Ross, (L. S.) Delegates to the said Cherokee Nation. (Cherokee Seal)

Signed, sealed and delivered in the presence of Jos. K. McCammon, N. P. Loveredge, Wm. A. Phillips.

DISTRICT OF COLUMBIA,
County of Washington, ss:

On this fourteenth day of June A. D. eighteen hundred and eighty-three, before me a Notary Public in and for the District aforesaid personally came Dennis W. Bushyhead, Richard M. Wolfe and Robert B. Ross, to me known to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed, for the purposes and under the authority therein mentioned.

Geo. M. Lockwood, Notary Public. (Seal)

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[fol. 24] EXHIBIT "E" TO PETITION

State of Oklahoma, Oklahoma Tax Commission Oklahoma City, Okla.

The return hereby acknowledged, as stated below, is accepted subject to audit and final determination of the correct tax liability.

The accompanying remittance is received subject to final audit and solvent credits. Penalties, as provided by law, will attach the same as if no remittance had been made, when, for any reason, checks, drafts, or other exchange are returned unpaid.

| Receipt No. | Total Tax Payable | Amount Remittance Date Received | Unpaid Balance | Name of Taxpayer Street, F. F. D or Box | City or Town | Number State |
|---|---|---|---|---|---|---|
| 114893 | 13.85 | 13.85 9-12-32 1931 | 0 | Edward A. Leahy, 319 E. Main | Pawhuska | 124381 Okla. |

Acknowledgment of receipt of return and remittance.
5. Income Tax.
Oklahoma Tax Commission, Paul E. Long, Cashier.

[File endorsement omitted.]

Filed in District Court, Oklahoma County, Oklahoma, Nov. 26, 1932, Cliff Myers, Court Clerk, by J. E. Brown, Deputy.

[fol. 25] IN DISTRICT COURT OF OSAGE COUNTY

[Title omitted]

PRÆCIPE FOR SUMMONS—Filed Oct. 10, 1932

To the Clerk of Said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Oklahoma County, the State of Oklahoma, for the defendants, State Treasurer of Oklahoma, Ray O. Weems, as State Treasurer, Oklahoma Tax Commission, Melven Cornish, W. D. Humphrey, and John T. Bailey, as members of the Oklahoma Tax Commission.

Amount claimed, $11.99, and interest from the — day of ——, 193-, at — per cent per annum and attorney's fees, $——.

Action brought for Recovery of State Income Tax.

Defendants required to answer on or before the 9th day of November, A. D. 1932. Make summons returnable 20th day of October, A. D. 1932.

Dated this 10th day of October, A. D. 1932.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

[File endorsement omitted.]

Filed in District Court Oklahoma County, Oklahoma, Nov. 26, 1932, Cliff Myers, Court Clerk, by J. E. Brown, Deputy.

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[fol. 26] IN DISTRICT COURT OF OSAGE COUNTY

[Title omitted]

SUMMONS AND RETURN—Filed Oct. 15, 1932

The State of Oklahoma to the Sheriff of Oklahoma County, Greeting:

You are hereby commanded to notify State Treasurer of Oklahoma, Ray O. Weems, as State Treasurer; Oklahoma Tax Commission, Melven Cornish, W. D. Humphrey and John T. Bailey, as members of the Oklahoma Tax Commis-

sion, that they have been sued by Edward A. Leahy, in the District Court of Osage County, State of Oklahoma, and that they must answer the petition of said plaintiff filed against them in the Court Clerk's office of said court, in the City of Pawhuska, in said county on or before the 9th day of November A. D., 1932, or said petition will be taken as true and judgment rendered accordingly.

You will make return of this summons on or before the 20th day of October, 1932.

[fol. 27] Given under my hand and the seal of this Court this 10th day of October, 1932.

Thos. Leahy, Sr., Court Clerk, by R. M. Marple, Deputy. (Seal.)

Suit brought for Recovery of State Income Tax.

If defendant fails to answer, plaintiff will take judgment for the sum of $11.99 and with interest thereon at the rate of —— per cent per annum from the — day of ——, 19—, and an attorney fee in the sum of $—— and all costs of this suit.

Thos Leahy, Sr., Court Clerk, by R. M. Marple, Deputy. (Seal.)

STATE OF OKLAHOMA,
County of Okla., ss:

Received this writ 11th October, 1932, o'clock — M., and as commanded therein, I summoned the following persons, defendants within named, at the times following, to-wit:

Ray O. Weems, as State Treasurer, Oct. 11, 1932.
Melvin Cornish, Oct. 11, 1932.
W. D. Humphrey, Oct. 11, 1932.
John T. Bailey, Oct. 11, 1932.
Okla. Tax Commission by serving Melvin Cornish, Chairman, Oct. 11, 1932.,

be delivering to each of said defendants, personally in said [fol. 28] county, a true and certified copy of the within summons, with all the endorsements thereon.

Sheriff Fees.

| | |
|---|---|
| Service and return, first person | $.50 |
| Serving 4 additional persons | 1.00 |
| Miles actually traveled 6 | .60 |
| 5 copies of summons | 1.25 |
| Total Fees | $3.25 |

Stanley Rogers, Sheriff, Okla. County, by Art Trouster, Deputy, State Capitol.

[File endorsement omitted.]

Filed in District Court, Oklahoma County, Oklahoma, Nov. 26, 1932.

Cliff Myers, Court Clerk, by J. E. Brown, Deputy.

---

[fol. 29] In District Court of Osage County

[Title omitted]

Motion for Change of Venue—Filed Nov. 12, 1932

Come now the defendants herein and respectfully move the Court to grant a change of venue in this action and transfer said cause to Oklahoma County, Oklahoma, for the following reasons to-wit:

First: That the Judge of this Court because he was formerly guardian of members of the Osage tribe of Indians and a large number of citizens in said Osage County, Oklahoma, are subject to the State income tax and are similarly interested with plaintiff in the outcome of this litigation; and by reason of such that local prejudice exists whereby the defendants cannot obtain a fair and impartial trial in said Osage County, Oklahoma.

Second: That said Treasurer of the State of Oklahoma and the members of the Oklahoma Tax Commission maintain their place for the transaction of their official business in Oklahoma County, Oklahoma; and it would be considerably to the convenience of the defendants of said offices [fol. 30] to have said cause transferred to Oklahoma County.

Wherefore, defendants respectfully move that said change of venue be granted and said cause be transferred as aforesaid.

C. W. King, Attorney, Oklahoma Tax Commission.

[File endorsement omitted.]

Filed in District Court, Oklahoma County, Oklahoma, Nov. 26, 1932.

Cliff Myers, Court Clerk, by J. E. Brown, Deputy.

---

[fol. 31] In District Court of Osage County

[Title omitted]

Order Granting Change of Venue and Transferring Said Cause to Oklahoma County, Oklahoma—Filed Nov. 12, 1932

This cause coming on for hearing this 12 day of November, 1932, upon the application of defendants for a change of venue; and the plaintiff being present by and through his attorneys, Leahy, MacDonald & Files, and the defendants appearing by and through C. W. King, attorney for Oklahoma Tax Commission, representing the defendants; and the matter having been fully considered.

It is hereby ordered and adjudged that said application, and motion, be granted and this cause is hereby transferred, and the venue of said cause changed to Oklahoma County, State of Oklahoma, and to the District Court therein.

The Court Clerk of this County and State is hereby directed to transfer the original files in this cause to the Court Clerk of Oklahoma County, State of Oklahoma, and it is directed that said cause be docketed upon the regular docket of that court.

[fol. 32] Jesse J. Worten, District Judge.

O. K.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

O. K.

C. W. King, Attorney for Defendants.

[File endorsement omitted]

Filed in District Court, Oklahoma County, Oklahoma, Nov. 26, 1932.

Cliff Myers, Court Clerk, by J. E. Brown, Deputy. Recorded book 157, page 558.

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[fol. 33] In District Court of Oklahoma County, State of Oklahoma

No. 77,299

Edward A. Leahy, Plaintiff,

vs.

State Treasurer of Oklahoma, Ray O. Weems, as State Treasurer; Oklahoma Tax Commission, Melven Cornish, W. D. Humphrey, and John T. Bailey, as Members of the Oklahoma Tax Commission, Defendants.

Demurrer—Filed Dec. 24, 1932

Come now the defendants and demur to the petition of plaintiff herein and for ground of said demurrer say: that the petition does not state sufficient facts to constitute a cause of action in favor of plaintiff and against the defendants or any of them.

J. Berry King, Attorney General, by F. M. Dudley, [fol. 34] Assistant Atty. Gen'l. C. W. King, Attorney for Oklahoma Tax Commission.

[File endorsement omitted]

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[fol. 35] In District Court of Oklahoma County.

[Title omitted]

Answer—Filed Feb. 21, 1933

Come now the defendants, State Treasurer of Oklahoma, Ray O. Weems and Oklahoma Tax Commission, Melven Cornish, W. D. Humphrey and John T. Bailey, members thereof, and for answer to the petition of the plaintiff filed herein allege and state:

First. Said defendants deny each and every material allegation contained in plaintiff's petition upon which said plaintiff seeks to recover, except such as are hereinafter admitted;

[fol. 36] Second. Defendants admit that the Oklahoma Tax Commission is preparing to and will, if not prevented, enforce the provisions of the Oklahoma Income Tax Law against the plaintiff in that said Oklahoma Tax Commission is seeking and will require said plaintiff to pay the income tax on the amount of income set up in his said return attached to and made a part of plaintiff's petition.

Third. Further answering, defendants, Ray O. Weems, State Treasurer, and the Oklahoma Tax Commission, allege that the amount paid, to-wit: $11.99, as alleged in plaintiff's petition, was paid as therein alleged and is now being held in the depository of the State of Oklahoma to abide the decision of this court.

Fourth. Further answering, defendants state that the plaintiff, Edward A. Leahy, is a member of the Osage tribe of Indians, enrolled as such and receives his pro rata quarterly payments from the trust fund being administered by the Federal government for the benefit of Osage Indians derived from the mineral resources belonging to Osage Indians; that heretofore, to-wit, on 24th day of May, 1928, a certificate of competency was issued to said plaintiff, copy of which said certificate is hereto attached and made a part hereof. That plaintiff is still in the full enjoyment of the said certificate of competency. Defendants further allege that the issuance of a certificate of competency to a member of the Osage tribe of Indians operates to all intents [fol. 37] and purposes as a removal of restrictions from said member and that thereafter all income derived by any such member of the Osage tribe whether from Government payments from trust funds belonging to the tribe in common derived from mineral resources as hereinabove stated or from other sources is subject to the provisions of the Income Tax Law of the State of Oklahoma, and that there is no exemption or immunity from the provisions of said Act which operate to relieve the said plaintiff herein from the payment of income taxes due the State of Oklahoma as shown by his said report.

Fifth. Defendants further allege that the reason that said funds belonging to this plaintiff from which the income in question is derived is handled by the Federal Government because of a large number of other members of the Osage tribe of Indians together with this plaintiff and other similar situated, are tenants in common of said fund and joint owners thereof and that so long as the said fund is administered by the Government for the benefit of the members of the tribe who have not been declared to be competent and to whom certificate of competency had not been issued, there is no practical method of dividing or distributing the respective interests of said Indians to whom certificate of competency had been issued separately and apart from the handling and distribution of the fund for the benefit of the non- competent Indian but for which fact the Government would cease to administer said funds.

[fol. 38] Wherefore, having fully answered defendants pray for judgment against the said plaintiff in the amount of $11.99 together with legal interest thereon at the rate of 12% per annum from the date of the accrual of said tax, and for costs.

C. W. King, Attorney for Oklahoma Tax Commission.

[File endorsement omitted.]

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[fol. 39] In District Court of Oklahoma County

[Title omitted]

Reply—Filed Feb. 21, 1933

Comes now the above named plaintiff and, for his reply to the answer of the above named defendants, denies generally and specifically each and every material allegation therein contained, except such as admit the allegations of plaintiff's petition, and except such as may hereinafter be specifically admitted.

Further answering, the plaintiff admits that a certificate of competency was issued to him by the Secretary of the Interior of the United States of America, as set out in the [fol. 40] answer of the defendants, and that the copy attached to the answer of the defendants is a true and correct copy of said certificate of competency.

Wherefore, having fully replied to the answer of the defendants, the plaintiff prays for the relief as prayed for in his petition herein.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 41] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MINUTE ENTRY

Be it remembered, That the following Minute of the Court appears of record in the above styled and numbered cause under date of March 25th, 1933:

"Ent. Specially assigned before Judge Hill Tuesday morning 9 a. m. (Hill.)"

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[fol. 42] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MINUTE ENTRY

Be it remembered, That the following Minute of the Court appears of record in the above styled and numbered cause under date of March 28th, 1933:

"Ent. Comes on for hearing. Cause submitted on the pleading. Judgment for Defendants all as per J. E. (Hill)".

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[fol. 43] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed March 28, 1933

Comes now the plaintiff and moves the court to grant a new trial in the above-entitled cause for the reasons following, to-wit:

I

The judgment and decision of the court is contrary to law.

II

Error of law occurring at the trial and excepted to by the plaintiff.

[fol. 44] III

The judgment is contrary to the facts.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 45] In District Court of Oklahoma County, State of Oklahoma

No. 77,299

Edward A. Leahy, Plaintiff,

vs.

State Treasurer of Oklahoma, Ray O. Weems and Oklahoma Tax Commission, Melven Cornish, W. D. Humphrey and John T. Bailey, Members Thereof, Defendants.

Journal Entry of Judgment—Filed April 1, 1933

Now, on this 28th day of March, 1933, this cause comes regularly on for trial in the above entitled court. Plaintiff appears by his attorneys, Leahy, Macdonald & Files; and the defendants appear by their attorneys C. W. King and W. C. Hall. Thereupon the parties hereto waived a jury and agreed to submit the cause to the court for its decision upon the pleadings.

Thereupon the court hears the arguments of counsel for [fol. 46] and on behalf of plaintiff and for and on behalf of the defendants and, being duly advised in the premises, finds the issues in favor of the defendants and against the plaintiff and that the plaintiff is not entitled to recover in this action as prayed for by him.

It is therefore, ordered, adjudged and decreed by the court that the said plaintiff take nothing by reason of this action, and that the defendants have their costs; to which finding and judgment of the court the plaintiff excepts and his exception is allowed.

Thereupon the plaintiff presents a motion for a new trial, and, after hearing arguments on the same and being fully advised in the premises, the court finds that said motion for a new trial should be denied.

It is therefore, by the Court ordered and decreed that the motion of the plaintiff for a new trial be and the same is hereby denied; to which finding and order of the court the plaintiff excepts, and his exception is allowed.

Thereupon the plaintiff gives notice in open court of his intention to appeal this case to the Supreme Court of the State of Oklahoma and asks that the court direct the clerk to note the same upon the journals of the court.

Thereupon the plaintiff asks and for good cause shown is given thirty days in which to prepare a case-made, or transcript of the record, for filing in the Supreme Court and to serve the same upon the defendants, and the defend-
[fol. 47] ants are given five days in which to suggest amendments thereto, the same to be signed and settled by the court upon three days notice from either party.

O.K. R. P. Hill, Judge.

Leahy, MacDonald & Files, Attorneys for Plaintiff.

C. W. King & W. C. Hall, Attorneys for Defendants.

[File endorsement omitted.]

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[fol. 48] RECITAL AS TO RECORD

The above and foregoing contains a full, true, correct and complete copy of all the pleadings, motions, orders, judgments and proceedings had, made and rendered in said cause, and also contains all of the evidence both oral and documentary introduced or offered on the trial of said cause, together with the objections of counsel thereto, the rulings and remarks of the Court thereon and the exceptions taken thereto, and is in all respects a full, true, correct and complete transcript and case-made.

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[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

CERTIFICATE OF ATTORNEYS

We hereby certify that the foregoing case-made and transcript contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered, and that the same is a full, true, correct and complete transcript and case-made.

Witness our hands this 24th day of April, 1933.

Leahy, MacDonald & Tiles, Attorneys for Plaintiff.

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[fol. 51] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ACKNOWLEDGMENT OF SERVICE OF TRANSCRIPT AND CASE-MADE

We, the undersigned attorneys of record of the defendants in the above entitled cause, do hereby acknowledge service of the foregoing transcript and case-made to have been made upon us this 24th day of April, 1933.

C. W. King, W. C. Hall, Attorneys for Defendants.
J. Berry King, Attorney General by J. B. Dudley, Assistant Atty. Genl.

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[fol. 52] IN DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

NOTICE OF SETTLEMENT OF TRANSCRIPT AND CASE-MADE

To C. W. King and W. C. Hall, attorneys of record for the defendants:

You are hereby notified that on the 25th day of April, 1933, at 9:00 o'clock a. m., or, as soon thereafter as counsel

can be heard, the Transcript and Case-made in said cause, with amendments suggested by you, if any, will be presented to the Honorable R. P. Hill, Judge of said Court, in his chambers in the City of Oklahoma City, Oklahoma County, State of Oklahoma, for settlement.

Leahy, MacDonald & Tiles, Attorneys for Plaintiff.

Service of the above Notice is hereby accepted on this 25th day of April, 1933.

J. Berry King, Atty. Genl.; J. B. Dudley, Asst. Atty. Genl.; C. W. King, Atty. for Okla. Tax Commission; W. C. Hall, Attorneys for Defendants.

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[fol. 53] In District Court of Oklahoma County

[Title omitted]

Stipulation of Attorneys as to Record

It is hereby stipulated and agreed by and between the parties hereto that the foregoing transcript and case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all objections of counsel, all the orders and rulings made and exceptions allowed and all of the record upon which the judgment and journal entry in said cause were made; and the same is a full, true, correct and complete transcript and case-made; and the defendant waives the right to suggest amendments to said transcript and case-made and hereby consents that the same may be settled immediately and without notice, and hereby joins in the request of the plaintiff that the Judge of said court settle the same and order the same certified by the court clerk and filed according to law.

Dated this 25th day of April, 1933.

Leahy, MacDonald & Tiles, Attorneys for Plaintiff.
J. Berry King, Atty. Genl.; J. B. Dudley, Asst. Atty. Genl.; C. W. King, Atty. Okla. Tax Com.; W. C. Hall, Attorneys for Defendants.

[fol. 54] In District Court of Oklahoma County.

[Title omitted]

Order Settling Transcript and Case-made

I, the undersigned Judge of the District Court of Oklahoma County, Oklahoma, and the trial judge of said above entitled cause, do hereby certify that the foregoing was presented to me as a transcript and case-made in the action above entitled, and due and legal service of this transcript and case-made having been made upon the attorneys of record for the above styled defendants, and the attorneys of record for the plaintiff and for the defendants having stipulated that the above and foregoing is a full, true, correct and complete transcript and case-made, and having waived the suggestion of amendments and stipulated that said transcript and case-made should be signed by me immediately and without notice, I now sign and settle the same as a full, true, correct and complete transcript and case-made, and direct that it be attested and filed by the court clerk according to law.

Witness my hand, this 25th day of April, 1933.

Attest:

R. P. Hill, District Judge. Cliff Meyer, Court Clerk, Oklahoma County, State of Oklahoma. By J. E. Brown, Depy.

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[fol. 55] [File endorsement omitted]

In Supreme Court of Oklahoma

No. 24,635

Edward A. Leahy, Plaintiff in Error,

vs.

State Treasurer of Oklahoma, Ray O. Weems, as State Treasurer; Oklahoma Tax Commission, Melven Cornish, W. D. Humphreys, and John T. Bailey, as Members of the Oklahoma Tax Commission, Defendants in Error.

Syllabus

1. Where a member of the Osage Tribe of Indians has received a certificate of competency by authority of the Act

of Congress of June 28, 1906, the income received by him as his pro rata share of the revenues derived from the sale of mineral resources of said tribe is free from all Federal restrictions and is taxable by the State.

Appeal from the District Court of Oklahoma County, Hon. R. P. Hill, Judge

Action to recover money paid as income tax under protest. Judgment for defendants, and plaintiff appeals.

Affirmed.

Louis N. Stivers, T. J. Leahy, C. S. MacDonald, and F. W. Files, for Plaintiff in Error. C. W. King, A. L. Herr, for Defendants in Error.

[fol. 56] OPINION—Filed June 18, 1935

GIBSON, J.:

The parties will be referred to herein as they appeared in the trial court.

The plaintiff commenced this action in the District Court to recover a sum of money paid to the State of Oklahoma as income tax for the year 1931, alleging that the amount so paid was illegally assessed against him and collected by the defendants. From a judgment in favor of the defendants, plaintiff has appealed.

The plaintiff is a member of the Osage Tribe of Indians and duly enrolled as such under the Act of Congress of June 28, 1906, and under the authority of said Act a Certificate of Competency was issued to him on the 24th day of May, 1924. The tax sought to be imposed by the State under Chapter 66, Article 7, Session Laws 1931, is an income tax upon the plaintiff's pro rata share of the income derived from the sale of the common mineral resources belonging to said tribe.

It is the contention of the plaintiff that, since the mineral resources of the Osages remain restricted and nontaxable by the State under the provisions of the Act of June 28, 1906, and successive Acts of Congress, the income derived therefrom by the individual members of the tribe is also non-taxable by the State; and further, since under the authority of said Act the United States holds said resources in trust for said tribe, the act of the State in attempting to collect such tax amounts to an attempt on the part of the State to levy a tax on a Federal instrumentality.

In support of his contention the plaintiff cites numerous authorities, some of which are highly persuasive. We are [fol. 57] of the opinion, however, that the case of Choteau v. Burnett, 283 U. S. 691, 75 L. Ed. 1353, is controlling upon this court on the question presented herein, and we feel constrained to adopt the rule laid down and to follow the reasoning expressed by the Supreme Court of the United States in that case.

The facts in Choteau v. Burnett, supra, were in all respects the same as the facts in the case at bar, except the question there presented was whether the United States had authority to levy and collect a tax against a like income of an Osage Indian under the General Revenue Act of 1918. The question was decided in the affirmative, and the Court, in fixing the status of the Indian with reference to the particular property in question, considering the same in the light of the applicable Acts of Congress, reasons and holds as follows:

(After referring to the Certificate of Competency issued to the plaintiff and the Act authorizing same.)

"The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. His share of the royalty from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. (Compare United States v. Waller, supra). It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. Work v. Mosier, 261 U. S. 352; Work v. Lynn, 266 U. S. 161. The claim that with respect to this income the petitioner was

restricted, and therefore exempt from the tax laid by Sections 210 and 211 (2) must fail."

[fol. 58] Although in the instant case the State of Oklahoma and not the Federal Government is attempting to levy and collect the tax, the reasoning of the court in Choteau v. Burnett, supra, is fully applicable to the case at bar, and the holding therein is controlling upon this court. In that case the Supreme Court of the United States has definitely fixed the status of an Osage Indian with relation to the income in question; the plaintiff here occupies the same position as the taxpayer in that case with reference to Federal restrictions, and the court there has established the existence of all requisites to taxing jurisdiction in the State of Oklahoma. His share of the royalty from oil and gas leases was payable to him without restrictions upon his use of the funds so paid; his status is no different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government, he has been, with respect to the income in question, fully emancipated; his ownership in the property is untrammeled; the duty on the part of the government to pay the income into his hands and his power to use it after it was so paid, were absolute. The government had fully released its control.

It is plain that the income here in question was free from government restrictions, and was not subject to control by any Federal agency. Therefore a tax levied by the State could not be a direct burden upon a governmental instrumentality, and could not be termed an interference by the State with the operations of the Federal Government. Indian Motorcycle Co. v. United States, 283 U. S. 567, 75 L. Ed. 1275.

[fol. 59] It follows that the plaintiff's income is not restricted property, and is not under the control of any governmental agency within the meaning of the Acts of Congress, and is therefore taxable by the State of Oklahoma.

The judgment of the trial court is affirmed.

Osborn, V. C. J., and Bayless, Busby, Phelps, & Corn, JJ., concur.

McNeill, C. J., and Riley, J., dissent. Welch, J., absent.

[fol. 60] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed June 27, 1935

Comes now the above named plaintiff in error, Edward A. Leahy, and respectfully represents to the court that on June 18, 1935, a decree and judgment was rendered by this court in said cause affirming the judgment and decree of the lower court and holding that the tax imposed by the State under Chapter 66, Article 7, Session Laws 1931, on the income derived from the sale of the common mineral resources belonging to the Osage Tribe of Indians in said state, was valid and enforcible and that plaintiff in error was liable for his pro rata share of such tax.

The plaintiff in error says said decision overlooked questions decisive of this case, and duly submitted by counsel and set out in their brief filed herein, and is in conflict with an express statute and controlling decisions which were called to the attention of the court in the brief of plaintiff in error.

Wherefore, plaintiff in error prays that a rehearing of said cause be granted by your Honorable Court.

McDonald & Files, Attorneys for Plaintiff in Error.

[fol. 61] Brief

We feel there is nothing we can add to what has been already said regarding the questions in this case, that will be of any particular aid to the court. However, we are so confident of our position and that the holding of this court is in direct conflict with the rule laid down by the Supreme Court of the United States in the cases cited in our brief that we trust further consideration may be given thereto and in accordance with the thought expressed in the two following extracts from our brief:

"It is entitled to consideration that statutes are silent on the right to tax property of members of the tribe other than real estate, but the statutes are not silent on the question that the personal property involved in this action is

trust property until turned over to the allottee. They are not trust property by virtue of any independent act of the Secretary of the Interior, but they are trust property by virtue of the laws with reference thereto. In construing statutes with reference to Indian matters, the requirement is that the construction shall be made which is most favorable to the Indian, and to that extent all legislation affecting Indians a different rule prevails that that which prevails with reference to the construction of other statutes." (p. 19.)

"Much stress was put upon the case of Chouteau v. Burnett, 283 U. S. 691, 75 L. Ed. 1353, in the lower court, but this case is not applicable in any way to the issues here. It was strictly a federal case in which the court held that Congress had the right to tax the income of an Osage Indian if it saw fit to do so and that the income tax statute was sufficiently broad to include the income of a member of the Osage Tribe of Indians with a certificate of competency; but the Supreme Court, as stated in Jaybird Mining Company v. Weir, supra, has distinctly held that the United States could impose a tax on its own instrumentalities, and the fact that it did so did not mean that the state could impose a tax." (p. 52.)

Respectfully submitted, Macdonald & Files, Attorneys for Plaintiff in Error.

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[fol. 62] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—September 25, 1935

The clerk is hereby directed to enter the following orders:

24,635. Edward A. Leahy v. State Treasurer of Oklahoma. Petition for rehearing denied. McNeill, C. J., Osborn, V. C. J., and Riley, J., dissent.

Edwin R. McNeill, Chief Justice.

Attest:

Andy Payne, Clerk.

[fol. 63] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

DISSENTING OPINION ON REHEARING—Filed Sept. 25, 1935

McNEILL, C. J.:

I am unable to agree with the conclusions announced by the Court and in view of the importance of the question I most respectfully indicate the grounds of my dissent.

The question involves the right of the State of Oklahoma to collect an income tax on the funds paid to a member of the Osage Tribe of Indians who had received a certificate of competency. These funds were derived from the bonuses, rentals and royalties paid by the lessees of the tribal mineral leases which had been given with the approval of the Secretary of the Interior. The funds obtained from these mineral sources, under the Congressional Act of June 28, 1906, are held in trust by the United States and placed to the credit of the individual member of the Osage Tribe according to the authorized roll of membership, or their heirs on the basis of a pro rata division.

It is the contention of the plaintiff in error, a member of said tribe, that the pro rata shares of these funds received by him is not subject to the state income tax; that the State of Oklahoma is without jurisdiction or authority to assess or collect the same, and that he should have judgment for the recovery of the tax paid under timely protest.

On the other hand, the State maintains that the issuance of a certificate of competency to a member of the Osage tribe of Indians was in effect a removal of restrictions on the land of plaintiff except as to the sale of his homestead and that plaintiff, after receiving such certificate of competency, was entitled to receive his pro rata share of said trust fund, free from all restrictions or control by the Federal Government; that the Acts of Congress of June 28, [fol. 64] 1906, and of March 3, 1921, removed all restrictions of plaintiff as to the funds herein involved; and that such funds, by reason thereof, became subject to state taxation.

The trial court sustained the tax. This court affirms that judgment. In my opinion this is error.

It is my view that the State is without power or authority to impose an income tax on the funds in question for the primary reason that the mineral reserves under the lands of the Osage Tribe of Indians are held in trust with the United States as a Federal instrumentality, partaking of the nature of a communal property interest, by virtue of treaties which the United States entered into with said tribe on November 10, 1808, and September 29, 1865, (Kappler's Laws and Treaties, Vol. 2, page 95, 878), and, the Osage Allotment Act (34 Stat. L. 539) passed by Congress on June 28, 1906; that the Federal instrumentality is exempt from the state taxing power; that this is not a tax upon the individual Indian but it is a tax upon these mineral resources which are clearly a part of the permanent taking of the corpus of the land which permanently depletes its value and which reserves were purchased by the Osage Tribe with its tribal funds; that it does not follow that the state can impose a tax on such a fund, or corpus of the land, for the same reason that it is within the power of the United States Government to subject these mineral resources to a Federal tax; that the State has a limited power under this class of property and cannot subject the same to the common burden. It is my opinion that these views are supported by the following authorities: Chouteau vs. Burnett, 283 U. S. 691, 75 L. Ed. 1353; Gillespie v. Okla., 257 U. S. 501, 66 L. Ed. 338; Shaw vs. Gibson Zahniser Oil Corp., 276 U. S. 575, 72 L. Ed. 709; Pollock vs. Farmers Loan & Trust Co., 157 U. S. 425, 39 L. Ed. 759; Weston v. Charleston, 27 U. S. 2 Pet. 449, 7 L. Ed. 48; Choate vs. Trapp, 224 U. S. 665; Work v. U. S. ex-rel., Mosier, 261 U. S. 352, 57 L. Ed. 693; Parker v. Riley, 250 U. S. 66, 63 L. Ed. 847; Cuff vs. Kosloskey, 165 Okla. 135, 25 Pac. (2d) 290; Mariwether vs. Lovett, 166 Okla. 73, 26 Pac. (2d) 200; State vs. Snyder, 29 Wyo. 163, 212 Pac. 758; State vs. Hatcher, (Tex.) 281 S. W. 192.

There is no dispute as to the facts nor as to the procedural method to recover the tax in question. It is conceded that plaintiff in error is a member of the Osage Tribe of Indians to whom a certificate of competency was issued by the Secretary of the Interior on May 24, 1924. During the year 1932, plaintiff received, as a member of such tribe, the amount in question as his pro rata share of the funds dervied from said mineral resources over which the govern-

ment specifically retained control and held in trust for the Osage Tribe of Indians, which express mineral restrictive feature, so far as I have observed, does not appear in any other Congressional Act relating to other tribes of Indians.

On November 10, 1808, the United States entered into a treaty with the Osage Tribe of Indians whereby the United States recognized said tribe as a political entity and placed the Great and Little Osage Nations under its protection and assumed the position of guardian and protector of said [fol. 65] tribe. This guardianship over the tribe has never been abandoned by the Federal Government and it remains solely with Congress to determine when it shall cease. United States vs. Ramsey, Wm. K. Hale, 271 U. S. 468, 70 L. Ed. 1039.

The Osage Tribe of Indians, in 1883, purchased their lands with their own tribal funds from the Cherokee Tribe and this land, surface and mineral rights, was held in trust by the United States for the use and benefit of said tribe. Under the act of 1906, the tribal lands were divided, in so far as the surface was concerned, in severalty among the members according to the authorized tribal rolls, and tribal deeds were issued with certain limitations, reservations and restrictions. In none of the Acts of Congress is there to be found any relinquished control by Congress over the minerals lying in and under said tribal lands. Tayrien vs. Tayrien, 51 Fed. 884; De Noya v. Arrington, 163 Okla. 44, 20 Pac. (2d) 563.

Under the Act of June 28, 1906, supra, (34 Stat. at Large 539, 543) Congress retained continuing control over these mineral resources. The act provided in part as follows:

"That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made, are hereby reserved to the Osage Tribe for a period of twenty-five years from and after the eighth day of April, nineteen Hundred and six; and leases for all oil, gas, and other minerals covered by selection and division of land herein provided for, may be made by the Osage Tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe; Provided, that the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of

the United States; and Provided further, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; Provided, however, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

The seventh paragraph of section 2 of said act also provided:

"That nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the us- of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided."

In the case of Pollock vs. Farmers Loan and Trust Co., 157 U. S. 427, 39 L. Ed. 759, it was held that a tax on the rents or income of real estate was a direct tax within the [fol. 66] meaning of the Constitution of the United States. That case has been very fully reported and contains all the briefs and the stenographer's reports of all the arguments of counsel.

After such an exhaustive presentation Mr. Justice Fuller, in part, said:

"As according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum forman chartae*, the whole land itself doth pass. For what is the land but the profits thereof?" Co. Lit. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm Wills (5th ed.) *798 and cases cited.

The requirement of the Constitution is that no direct tax shall be paid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a

direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant."

In that case reference was made to Weston vs. Charleston, 27 U. S. 2, Pet. 449. The ordinance of the City of Charleston was involved and a levy was attempted to be made upon the interest from the bonds and not upon the bonds. It was held that a tax on the income of the United States securities was a tax on the securities themselves, and that an income tax upon the interest of the bonds was not sustainable, although Mr. Justice Thompson and Mr. Justice Johnson dissented from that view. In the Pollock case there was also cited, the case of North Central Ry. Co. vs. Jackson, 74 U. S. 7, Wall 262 (19 L. Ed. 88) wherein it was held that a tax upon the interest payable on the bonds was a tax not upon the debtor, but upon the security. In view of the holding of the Supreme Court of the United States in the Pollock case, supra, that a tax upon the rents or income issuing out of the land is the same thing as a tax upon the real estate, it seems to me that by analogy the same reasoning is applicable when a tax is sought to be imposed upon that which comes from the corpus of the land in the way of bonuses, rentals and royalties from mineral reserves over which the Government imposed restrictions for the purpose of protecting the Indians from their own incompetency when, in fact, such bonuses, rentals and royalties constitute a permanent taking of the corpus of the land, a permanent depletion of the soil, a consumption of the mineral resources which reduces the mineral value and thereby produces a reduction of the value of land. See Cuff vs. Koslosky, 165 Okla. 135, 25 Pac. (2d) 290; State vs. [fol. 67] Snyder, 29 Wyo. 163, 212 Pac. 758; State v. Hatcher (Tex.), 281 S. W. 192; Work vs. U. S. ex rel. Mosier et al., 261 U. S. 352, 57 L. Ed. 693; Parker v. Riley, 250 U. S. 66, 63 L. Ed. 847.

Oil and gas in place are minerals and so long as they remain unsevered from the soil are a part of the corpus of the land. Cuff vs. Koslosky, supra. In that case it was said:

"After oil and gas have been discovered and produced from the premises under either the oil and gas lease or the mineral deed, the corpus of the land becomes changed and depleted in proportion to the amount of the oil and gas lifted, captured, and severed from the soil. The removal of a portion of the corpus of the land from its unseen mineral reservoirs is not replaceable. After this removal, depletion, or production, there has been to that extent an alienation and dismemberment of the common-law freehold estate in the land."

The rights in the minerals are valuable property rights, Meriwether vs. Lovett, 166 Okla. 73, 26 Pac. (2d) 200. These minerals, when removed from the corpus, deplete and dismember the soil and in that respect are unlike grass, growing crops and fruits reproducing themselves.

The usual oil and gas mining lease is equivalent to a license to take from the corpus of the land that portion of the corpus of the land itself as consists of the oil and gas to be taken under the lease as though it were an out and out sale of that particular portion of the corpus of the land. State vs. Hatcher, supra, citing Gowan vs. Christie, L. R. 2 Sc. App. 284; Leake's Law of Property in Land, Vol. 2 Page 55. It must be remembered that these mineral resources are not confined to the land, allotted in severalty, under the Act of 1906, supra, but these rights and reserves are tribal interests and not interests in severalty. The mineral resources were never divided in severalty. The owner of the land of an Osage Allotment does not individually own the minerals thereunder. These reserves remain as tribal property and the free right of alienation of such reserves or property rights in same, without question, have never been consented to by Congress directly or indirectly. Even under the Act of April 12, 1924, (43 Stat. L. 94), a person not of Indian blood could not sell his right to, or interest in, the lands, monies, or mineral interests of the tribe without the approval of the Secretary of the Interior. The granting of a certificate of competency did not remove the restrictions imposed on the mineral reserves.

Mr. Chief Justice Taft, in the Works case, supra, in discussing the bonus which was paid for an oil and gas lease secured from members of the Osage tribe said:

"It was, in effect, a supplement to the royalties already determined. * * *

Of course, it involved a consumption and reduction of the mineral value of the land, but so does a royalty."

In the case of Parker vs. Riley, supra, Mr. Justice Van [fol. 68] Deventer, discussing an oil and gas lease in that case, stated that the minerals, (Oil and Gas) were part of the homestead.

In the case of Superintendent of the Five Civilized Tribes, for Sandy Fox, Creek No. 1263, vs. Commissioner of Internal Revenue, Case No. 817, October Term, 1934, Mr. Justice McReynolds in speaking for the Supreme Court of the United States said:

"* * * The general terms of the taxing act include the income under consideration and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.

Neither the Creek agreement of 1901, nor the supplemental agreement (1902) conferred general exemption from taxation upon Indians; homesteads only were definitely excluded, although alienation of allotted lands was restricted.

The suggestion that exemption must be inferred from the Act of April 26, 1906 (34 Stat. L. 137) or May 27, 1908 (35 Stat. L. 312) is not well founded. The first of these extended restrictions upon the alienation of allotments for twenty five years unless sooner removed by Congress, and provided: "Sec. 19—. That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee." This exemption related to land and not to income derived from investment of surplus income from land. Moreover, the Act itself was superseded by the second one which did not contain the quoted provisions, but declared; "Sec. 4. That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Trives. * * *."

We find nothing in either act which expresses definite intent to exclude from taxation such income as that here involved. See Shaw vs. Oil Corp., 276 U. S. 575, 581."

The majority opinion relies upon that case, but I construe that case as distinguishable from the facts at bar.

We are not considering the same character of a case. In that case funds which had been derived from a restricted allotment of a full blood Creek Indian were invested and Mr. Justice McReynolds very properly said:

"that if exemption exists it must derive plainly from agreements with the Creeks, or some act of Congress dealing with their affairs."

It that opinion it was pointed out that the exemption related to the land and not to the income derived from the investment of a surplus income from land. Under the facts in the instant case we are not concerned with income of that class and character. The term "income" as so used was given its ordinary meaning. In the case at bar it is in my opinion that the common acceptation of the meaning [fol. 69] of the term 'income' cannot be correctly extended to cover bonuses, rentals and royalties derived from restricted oil and gas mining leases of the Osage Tribe. In the instant case we are concerned with the restricted mineral resources of the Osage Tribe and the tax sought to be imposed upon the distributed funds in question is equivalent to a direct tax upon the bonuses, rentals and royalties which constitute a component and integeral part of the restricted mineral resources. These mineral reserves and the right of participating in the distribution of the funds therefrom under the provisions of the Allotment Act of June 28, 1906, and aets amendatory thereof and supplemental thereto are inalienable, whether the headright is owned by Indians with certificates of competency, or by Indians without certificates of competency, the sole exception as to alienability being that under the Act of 1924, headrights, when owned by persons not of Indian blood, may be sold with the consent and approval of the Secretary of the Interior, a headright being the right of enrolled members of the tribe, or their heirs, to share in the distribution of the funds received from the oil, gas and mineral received from bonuses, rentals and royalties paid on oil and gas mining leases given by the tribe under the approval of the Secretary of the Interior. Denoya vs. Arrington, supra, Taxes are not debts. See. City of Sapulpa vs. Land, 101 Okla. 22, 223 Pac. 640. They become an enforceable lien on the property on which they were exacted. How could such a tax be enforced against an incompetent Indian by

the State? The State can not impose an income tax upon the income of Liberty Bonds of a competent or incompetent Osage Indian, which were purchased through the United States Government, nor can the State impose an income tax upon the salaries of the Federal Judges who reside within the State. The principle is analagous to the instant question. The Liberty Bonds and income therefrom are exempt from taxation. Likewise, the mineral resources are exempt as well as the proceeds therefrom. The State is without power to sell these mineral reserves or enforce any tax against the same. These resources are federal instrumentalities, and it is fundamental that federal instrumentalities may not be taxed by a state. McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481; New York Bank of Commerce v. Commissioners of Taxes & Assessments, 2 Black 620, 17 L. Ed. 451; Collector v. Day, 11 Wall. 113, 20 L. Ed. 122; Choctaw, Oklahoma & Gulf R. R. Co. vs. Harrison, 235 U. S. 292, 135 S. Ct. 27, 59 L. Ed. 234; Indian Territory I. Oil Co. v. Oklahoma, 240 U. S. 522, 36 S. Ct. 453, 60 L. Ed. 779; Howard vs. Gypsy Oil Co., 247 U. S. 503, 38 S. Ct. 426, 62 L. Ed. 1239; Large Oil Co. v. Howard, 248 U. S. 549, 39 S. Ct. 183, 63 L. Ed. 416; Gillepsie v. Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338; Northwestern Mutual Life Insurance Co. v. State of Wisconsin, 275 U. S. 136, 48 Sup. Ct. 55, 72 L. Ed. 202. To impose the questioned tax in the instant case would be placing a burden and direct charge upon the exempted principal,—the corpus, the mineral resources, the bonuses, rentals and royalties.

It is my conclusion that Congress has not released its control over the mineral resources of the Osage Tribe of Indians by granting a certificate of competency to a member of that tribe; that the tax in question is nothing short of a direct tax upon that which constitutes an integral part of the corpus of the restrictive mineral resources, the very [fol. 70] security itself, a federal instrumentality devised for the care and protection of the members of said tribe against their own prodigality; and that such a tax is void and not sustainable, being in violation of the acts of Congress dealing with the affairs of the Osage Tribe of Indians, as well as the Constitution of Oklahoma, article I, section 3, and article 10, section 6.

For these reasons I dissent.

I am authorized to announce that Mr. Vice Chief Justice Osborn and Mr. Justice Riley concur in this dissent.

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[fol. 71] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION FOR STAY OF MANDATE—Filed Sept. 26, 1935

Comes now the plaintiff in error above named and represents and shows to the court that on Sept. 25, 1935, this court by order duly entered, denied the petition of plaintiff in error for a rehearing in said cause. Plaintiff in error desires and intends to apply to the Supreme Court of the United States for a Writ of Certiorari to this court commanding it to send up the record in said cause to that court for review. The time allowed by law for filing said petition for Writ of Certiorari is three months from said Sept. 25, 1935, and with all reasonable diligence on the part of plaintiff in error, said petition, supporting brief and transcript of the record could not be printed and served on opposing counsel and filed in less than sixty days from said date and probably in not much less time than the statutory period.

Plaintiff in error says it would be undesirable to both parties hereto to have the mandate of this court transmitted to the trial court prior to a ruling and decision of the Supreme Court of the United States on said petition [fol. 72] for writ of certiorari, and if said writ be granted, then before final decision by said court in the cause.

Wherefore plaintiff in error prays that this court make and enter an order staying the issuance of the mandate in this cause to the lower court pending the filing by plaintiff in error of his petition for writ of certiorari in the Supreme Court of the United States, and upon the filing thereof and the giving of notice thereof by the Clerk of the Supreme Court of the United States to the Clerk of this court on or before Nov. 23, 1935, that such mandate be stayed until a final decision is made by the Supreme Court of the United States in said certiorari proceedings.

C. S. Macdonald, Attorney for Plaintiff in Error.

[fol. 73] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—Filed Sept. 26, 1935

Now, on this 26 day of Sept., 1935, upon application of the plaintiff in error, and for good cause shown, it is ordered that the mandate in this case be stayed for a period of sixty days to enable plaintiff in error to file his petition for a writ of certiorari in the Supreme Court of the United States, and if such petition is filed within such time then made is to be stayed until said proceedings in certiorari are finally determined.

Edwin R. McNeill, Chief Justice.

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[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 6, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
NOV 22 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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# No. 599

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EDWARD A. LEAHY,

*Petitioner,*

*v.*

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVIN CORNISH, W. D. HUMPHREY, AND JOHN T. BAILEY, AS MEMBERS OF THE OKLAHOMA TAX COMMISSION.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

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CHARLES STUART MACDONALD,
*Pawhuska, Oklahoma,*
F. W. FILES,
*Pawhuska, Oklahoma,*
*Attorneys for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

# No. 599

EDWARD A. LEAHY,

*Petitioner,*

*v.*

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVIN CORNISH, W. D. HUMPHREY, AND JOHN T. BAILEY, AS MEMBERS OF THE OKLAHOMA TAX COMMISSION.

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

*To the Honorables, Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Edward A. Leahy, most respectfully represents and shows to you as follows:

### History of the Case.

The petitioner instituted this action in the District Court of Osage County, Oklahoma, on October 10, 1932. Later it

was taken by change of venue to the District Court of Oklahoma County in said State. (R. 20.)

Petitioner is a member of the Osage Tribe of Indians in Oklahoma and was enrolled as such under Act of Congress of June 28, 1906 (34 Stat. L. 539), and by authority of such act a certificate of competency was issued him May 24, 1924.

The said tribe of Indians is the owner of certain mineral resources which the United States holds in trust for it and its members under various acts of Congress, wherein it is provided that the same shall not be allotted to the individual members of the tribe, but reserved and the proceeds only therefrom paid them. (R. 12.)

In 1932, the State of Oklahoma, through the Oklahoma Tax Commission, demanded that petitioner make and file with it an income tax return including therein the amounts paid him as his pro rata share of the proceeds from said mineral resources. This demand the petitioner complied with and under notice and protest paid to the State the tax levied on such return. Then, as provided by the laws of said State, he brought this action to recover the amount so paid, on the theory, that the income he received as a member of said tribe of Indians was his proportionate part of the income from its said mineral resources which were under the control of the Federal government and therefore not subject to any State tax. (R. 8.)

The case was submitted to the court on the pleadings, all the facts being set forth therein and the same being undisputed. Judgment was rendered in favor of respondents and petitioner was denied the relief prayed for and all relief. (R. 25.)

Petitioner thereupon prosecuted proceedings in error to the Supreme Court of Oklahoma, which court, on June 18, 1935, handed down its decision affirming the judgment of the trial court and holding that petitioner had been fully

emancipated as a ward of the government and that when he was paid his share of the revenues from the mineral resources of his tribe, the same was received by him freed of all Federal restrictions and was, therefore, taxable by the State of Oklahoma. (R. 29.)

On June 28, 1935, and within the time allowed by law and the rules of said Supreme Court, petitioner filed his petition for a rehearing of said cause (R. 33), which was by said court on September 25, 1935, overruled and denied. (R. 34.) Thereafter petitioner duly filed his motion for a stay of mandate in said cause pending application for, and hearing of, a writ of certiorari which was by said court on September 26, 1935, granted and allowed. (R. 45.)

**Reasons for Granting Petition for Writ of Certiorari.**

A.

The Federal question of substance, and not theretofore directly determined by this Court (as to the power and authority of the State of Oklahoma to levy and collect an income tax from members of the Osage Tribe of Indians holding certificates of competency, and which tax is based on such members' pro rata share of the proceeds of the mineral resources of said tribe), was decided by said Supreme Court in favor of respondents by holding that such members, so far as the tax in question was concerned, occupied a position no different from that of any other citizens of the United States; that the duty on the part of the government to pay them their share of these proceeds and their power to use such income thereafter were absolute and consequently the same was paid and received free from all Federal restrictions and thus became subject to taxation at the hands of the State. Said decision has not been published but appears on page 55 of the transcript. Mr. Justice McNeill's dissenting opinion will be found on page 35 of the transcript.

B.

The said decision of the Supreme Court of Oklahoma is also probably not in accord with the applicable decisions of this court, including the cases of *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. Ed. 338; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 72 L. Ed. 709.

C.

A certified transcript of the record, certified by the Clerk of the Supreme Court on September 26, 1935 (R. 45), is transmitted herewith, and your petitioner, Edward A. Leahy, respectfully requests that same be filed as an exhibit to the petition for certiorari.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court to the Supreme Court of Oklahoma, commanding said court to certify to this Court a full and complete transcript of the record and of the proceedings in said Supreme Court had in the case numbered and entitled on its docket, No. 24,635, Edward A. Leahy, Plaintiff in Error, v. State Treasurer of Oklahoma, Ray O. Weems as State Treasurer; Oklahoma Tax Commission, Melvin Cornish, W. D. Humphreys, and John T. Bailey, as members of the Oklahoma Tax Commission, Defendants in Error, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Supreme Court of Oklahoma be reversed by this Court and for such further relief as this Court may deem proper.

Dated November 6, 1935.

EDWARD A. LEAHY,
By CHARLES STUART MACDONALD,
FRANK W. FILES,
*Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of the Court Below.

The opinion of the Supreme Court of the State of Oklahoma has not been as yet officially reported. It was rendered on June 18, 1935, and thereafter a petition for rehearing was filed by the plaintiff in error, which was overruled and denied on September 25, 1935. Both the opinion and the dissenting opinion is copied in full in the record filed in this court on pages 29 and 35. The opinion, together with the dissenting opinion, appears in Pacific Reporter, Second Series, Advance Sheet November 1, 1935, page 570 (49 Pac. (2d) 570, not officially reported).

### II.

### Jurisdiction.

Jurisdiction of this Court is covered by the Judicial Code, Section 237b, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this Court adopted June 5, 1928, effective July 1, 1928, and that the date of the judgment to be reviewed is September 25, 1935, and upon motion duly made in said cause the petitioner was granted a stay of mandate by the Chief Justice of the Supreme Court of Oklahoma for sixty days from the date of said judgment to enable the petitioner to file his petition for a writ of certiorari in the Supreme Court of the United States.

### III.

### Statement of Case.

A statement of the case has been given in the petition and, in the interest of brevity, will not be repeated here.

## IV.

### Specifications of Error.

1. The Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Oklahoma County, Oklahoma.

2. The Supreme Court of the State of Oklahoma erred in holding that your petitioner, an allotted Osage Indian, was liable to the State of Oklahoma for State income tax upon his pro rata quarterly payment paid to him as a member of the Osage Tribe of Indians, which income was derived directly from the mineral interests of said tribe, which said mineral interest is held in trust by the United States of America for the benefit of the Osage Tribe of Indians.

3. That the Supreme Court of the State of Oklahoma erred in not holding that the income derived by the said petitioner from mineral resources was part of the capital assets of said tribe and, therefore, was not subject to tax on distribution to the members thereof.

4. That the Supreme Court of Oklahoma erred in not holding that the income from the mineral resources was a part of the restricted corpus of the petitioner's property, and that the taxation thereof amounted to a permanent taking and depletion of such property and, therefore, interferes with a Federal instrumentality which is exempt from the State taxing power.

### Argument—Summary.

The Act of June 28, 1906, entitled "An Act for the Division of the Lands and Funds of the Osage Indians in Oklahoma Territory, and for Other Purposes," provided, among other things, that the lands of the tribe (with cer-

tain exceptions) should be divided among the members thereof by giving to each his or her fair share thereof in acres, and providing that each member should be entitled in his first selection to one hundred and sixty (160) acres, and that after each member had made his first selection he should be permitted to make a second selection of one hundred sixty (160) acres, and that, after each member had made his second selection, he should be permitted to make a third selection of one hundred sixty (160) acres, and that he should designate which one of his selections should be his homestead, and his certificate of allotment and deed should designate the same as such.

It is also provided that, after each member had made his first, second and third selections of one hundred and sixty (160) acres, the remaining lands of the tribe (with certain exceptions) should be divided as equally as practicable among the members by a commission to be appointed to supervise the selection and division thereof.

The minerals under all of the Osage lands were expressly reserved to the tribe by Section 3 of said Act, which is as follows:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is hereby made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, That the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: And provided further, That no mining of or prospecting for any of said mineral or minerals shall be permitted on the home-

stead selections herein provided for without the written consent of the Secretary of the Interior: Provided, however, That nothing herein contained shall be construed as affecting any valid existing lease or contract."

All funds belonging to the tribe and money due, or that might become due, were to be held in trust by the United States for a period of twenty-five (25) years from and after January 1, 1907 (with certain exceptions).

The first subdivision of Section 4 of the Act is as follows:

"That all the funds of the Osage tribe of Indians, and all the moneys now due or that may hereafter be found to be due to the said Osage Tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage tribe on a basis of a pro rata division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: Provided, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And provided further, That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

The second subdivision of said section is as follows:

> "That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided."

After the expiration of the period of twenty-five (25) years from January 1, 1907, the lands, mineral interests and monies, provided in said Act to be held in trust, should become the absolute property of the individual members of the tribe according to the rolls provided for in the Acts unless otherwise provided by Act of Congress. This trust period has now been extended by the Act of March 2, 1929 (45 Stat. L. 1478), until January 1, 1959, unless otherwise provided by Act of Congress.

Section Nine of the Act of June 28, 1906, *supra*, provided for the biennial election of officers for the Osage Tribe. It is as follows:

> "That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief and eight members of the Osage Tribal Council to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in

June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be elected for a period of two years, commencing on the first day of July following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

It will, therefore, be observed that the oil, gas and other mineral rights were not allotted in severalty to the various members of the tribe but were reserved to said tribe in common; that the lands should be leased by the tribe through its tribal council with the approval of the Secretary of the Interior—funds derived therefrom to be deposited in the Treasury of the United States to the credit of the members of the tribe and to be thereafter disbursed to the individual members according to the roll in the manner and at the same time payments are made of interest on other funds held in trust for the Osages by the United States Government.

It will be observed that Congress preserved the tribal government of the Osages and provided a manner in which their officers should be elected and authorized such officers to act for the tribe in its semi-sovereign capacity.

The certificate of competency issued to your petitioner, under Subdivision seven (7) of section two (2) of said Act, authorized your petitioner to sell and convey any of the *lands deeded to him* (*except his homestead*), *but it did not authorize him to sell the oil, gas, or other minerals* covered by said lands, which minerals were expressly reserved to

the use of the tribe, nor did it authorize him to sell, or convey his interest (or any part thereof) in the minerals underlying the original reservation, which was allotted in severalty under the Act of 1906, or said tribe, and, as to said minerals, he is still restricted.

As above stated, *the mineral rights have never been allotted in severalty, nor has any member of the Osage Tribe, regardless of quantum of blood, or the issuance of a certificate of competency, ever been authorized by Congress to sell or dispose of his interest in said minerals so reserved to the tribe.*

The Act of April 12, 1924 (34 Stat. L. 94), being an Act amendatory of the Act of June 28, 1906, provides that any right to, or interests in, the lands, monies, or mineral interests, as provided in the Act of Congress approved June 28, 1906, and amendatory and supplementary acts thereof, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe.

There is no Act of Congress authorizing any member of the Tribe, whether he had a certificate of competency or not and regardless of quantum of blood, to sell, assign or transfer his interests in the tribal mineral properties, or in any other tribal property.

**Supporting Reasons—A.**

It is submitted that the court below erred in holding that the money paid to this petitioner as his part of the proceeds of the Osage Tribe of Indians derived from the mineral interests of said tribe was subject to an income tax levied by the State of Oklahoma. The mineral resources of the Osage Tribe of Indians are reserved to the tribe as a whole, and

the income derived from royalties and bonus payments are distributable quarterly to such members regardless of their status. To tax this income would amount to a permanent taking of the corpus of the property which permanently depletes its value. That the imposition of such tax would interfere with the Federal instrumentality under which the development for oil and gas for the benefit of the Osage Tribe of Indians is carried on by the Secretary of the Interior of the United States of America under appropriate acts of Congress.

In the case of *Choteau* v. *Burnett,* 283 U. S. 691, 75 L. Ed. 1353, there was involved the question as to whether or not the income of a member of the Osage tribe of Indians who had received his certificate of competency, and which income came from his interest in the mineral resources of the tribe, fell within the purview of the Federal income tax law. The Supreme Court held that it did.

The question of the right of the State to impose a tax is disposed of in that case under the following language:

> "Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power (*Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 72 L. ed. 709, 48 S. Ct. 333, *supra*) on the ground that, while in the possession of the United States they are a Federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a Federal Tax. * * *."

*Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 39 L. Ed. 759;

*Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 70 L. Ed. 1112;

*Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. Ed. 338, 42 S. Ct. 171;

*Quarles* v. *Dennison,* 38 F. (2d) 662;

*DeNoya* v. *Arrington* (Okla.), 20 P. (2d) 563, 568;

**Supporting Reasons—B.**

The decision of the Supreme Court of the State of Oklahoma in this case is most certainly not in accord with the decisions of the Supreme Court of the United States in similar matters.

*Gillespie* v. *Oklahoma, supra;*
*Pollock* v. *Farmers Loan & Trust Company, supra.*
*Jaybird Mining Co.* v. *Weir, supra.*

**Supporting Reasons—C.**

The dissenting opinion in the above case, written by Chief Justice McNeill of the Supreme Court of the State of Oklahoma and concurred in by Mr. Vice-Chief Justice Osborn and Mr. Justice Riley, is a brief within itself and gives ample reasons for review of this case. The opinion shows that a great deal of time was spent in exhaustively examining the various treaties, Acts of Congress and the decisions of the court bearing thereon. No doubt, the conclusion reached in this dissenting opinion is correct. No part of this dissenting opinion will be quoted here since the same appears in the record.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that your petitioner may have justice, and that a writ of certorari should be granted, and this court should review the decision of the Supreme Court of the State of Oklahoma and finally reverse the same.

CHARLES STUART MACDONALD,
*Pawhuska, Oklahoma,*
*Counsel for Petitioner.*

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Supreme Court U.S.
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JAN 27 1936
CHARLES ELMORE CROPLEY

No. 599

# In the Supreme Court of the United States

*October Term, 1935.*

EDWARD A. LEAHY, *Petitioner,*

*vs.*

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, AS STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVIN CORNISH, W. D. HUMPHREY AND JOHN T. BAILEY, AS MEMBERS OF THE OKLAHOMA TAX COMMISSION, *Respondents.*

*Appeal from the Supreme Court of Oklahoma.*

## STATEMENT AND BRIEF OF PETITIONER.

CHARLES STUART MACDONALD,
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*Of Counsel:*
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Pawhuska, Okla.

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*Appeal from the Supreme Court of Oklahoma.*

## STATEMENT *and* BRIEF *of* PETITIONER.

Your petitioner in support of the jurisdiction of this court to review the above-entitled appeal respectfully represents:

I.

That this Honorable Court has jurisdiction to review the decision of the Supreme Court of Oklahoma, under section 237 of the Judicial Code as amended by the Act of February 13, 1925, now section 344-B, title 28 of the U.

S. Code, and as further amended or modified by the Act of January 31, 1928, title 28, U. S. C. A., sections 344, 344-B, 861-A and 861-B.

II.

The opinion of the Supreme Court of the State of Oklahoma was filed June 18, 1935 (R. 30), and the dissenting opinion field September 25, 1935. (R. 35) The majority opinion and dissenting opinion are reported in the 49 Pacific Reporter (2d), 571. The federal question of substance, and not heretofore directly determined by this court, is the power and authority of the State of Oklahoma to levy and collect an income tax from members of the Osage tribe of Indians having certificates of competency from the income from the minerals reserved to the Osage tribe of Indians and the royalties from oil and gas leases upon said minerals reserved to the Osage tribe of Indians when such royalties are prorated and paid such members of the Osage tribe of Indians. The Supreme Court of Oklahoma held the pro rata income of such members from such mineral rights was subject to a state income tax.

III.

The petitioner is a member of the Osage tribe of Indians in Oklahoma and is enrolled as such under the Act of Congress of June 28, 1906 (34 St. L. 539), and, under the authority of said act, the petitioner was issued a certificate of competency May 24, 1924. In 1932, the State of Oklahoma, through the Oklahoma Tax Commission, demanded that petitioner make and file with it an income tax return under the state law including therein the amounts paid him as his pro rata share of the proceeds from said mineral resources. This demand the petitioner complied with and,

under notice and protest, paid to the state the tax levied on such return. Thereafter, as provided by the laws of the State of Oklahoma, he brought this action to recover the amount so paid on the theory that the income he received as a member of the Osage tribe of Indians was his proportionate part of the income from the mineral rights reserved to the Osage tribe of Indians, which mineral reserves were under the control of the federal government, and the oil and gas leases were made by the federal government, and it is our position that the mineral reserves to the Osage tribe of Indians, and the management thereof, is a federal instrumentality not subject to a state tax. (R. 8) The cause was submitted to the Supreme Court of the State of Oklahoma on the pleadings, all of the facts being set forth therein, the same being undisputed.

IV.

After the rendition of the judgment by the Supreme Court of the State of Oklahoma, your petitioner filed in this court a petition for writ of *certiorari* to the Supreme Court of Oklahoma, together with a transcript of the record, which was docketed in this court on the 22nd day of November, 1935. On January 6, 1936, this honorable court made an order allowing the writ which was on said day entered, and, under said order, it is provided that the certified transcript of the proceedings below which accompanies the petition for the writ should be treated as though filed in response to the writ.

## SPECIFICATIONS *of* ERROR.

*1.* The Supreme Court of the State of Oklahoma erred in affirming the decision of the District Court of Oklahoma County, Oklahoma.

*2.* The Supreme Court of the State of Oklahoma erred in holding that your petitioner, an allotted Osage Indian, was liable to the State of Oklahoma for state income tax upon his pro rata quarterly payment paid to him as a member of the Osage tribe of Indians, which said income was derived directly from the mineral interests of said tribe, which said mineral interest is held in trust by the United States of America for the benefit of the Osage tribe of Indians.

*3.* That the Supreme Court of the State of Oklahoma erred in not holding that the income derived by the said petitioner from mineral resources was part of the capital assets of said tribe and, therefore, was not subject to tax on distribution to the members thereof.

*4.* That the Supreme Court of Oklahoma erred in not holding that the inome from the mineral resources was a part of the restricted corpus of the petitioner's property, and that the taxation thereof amounted to a permanent taking and depletion of such property and, therefore, interferes with a federal instrumentality which is exempt from the state taxing power.

## ARGUMENT.

We deem it advisable in presenting this case to the court to go into the propositions as to the status and relationship of the Osage tribe of Indians towards the United States as determined by the various treaties between the Osage tribe of Indians and the United States and the various statutes of the United States.

Prior to the Louisiana Purchase, the Osage tribe of Indians was under the jurisdiction of France, but, by reason of that purchase, they became subjects of the United States. On November 10, 1808, the United States entered into a treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (Kappler's Laws and Treaties, Vol. 2, page 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "*Art. 6.* And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations, respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to-wit: Beginning at Fort Clark, on the Missouri, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the River Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be paid off in such man-

ner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty provides:

> "*Art. 10.* The United States receives the Great and Little Osage Nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer their lands to any foreign power, or to citizens of the United States, or to the inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Louisiana Purchase on the part of the United States to assume the position of guardian and protector of the Osage tribe.

On September 29, 1865, another treaty (Kappler's Laws and Treaties, Vol. 2, page 878) was entered into between the United States and the Osage tribe of Indians, article 10 of which expresses the dependency of the Osages upon the United States, and reads as follows:

> "The Osages acknowledge their dependency on the Government of the United States and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians, and they further agree to use their

best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

> "*Art. 17.* Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the Senate and approved by the President."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this act, Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and acts of Congress establish the trust relation between the United States and the Osage tribe of Indians, but the United States, as a further evidence of such relationship, received from the Cherokee Nation, in trust for the Osage tribe, a deed for the lands from which it now receives its mineral rights, and these same minerals are now held by the United States under such trust deed (Exhibit D, R. 12). The same thereby became a federal agency, by which the United States has

endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to the said tribe and held in trust by the United States.

It is specifically stated in said deed:

"This indenture, made and entered into this 14th day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolf and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part and the United States of America, *in trust for the use and benefit of the Osages and Kansas Indians,* of the second part, witnesseth, that * * * (Italics ours.)

"Whereas, by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation, the sum of One Million, Ninety-nine Thousand One Hundred and Thirty-seven and Forty-one Hundredths Dollars ($1,099,137.41), in payment of said tract of land. * * *

"Therefore, by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three.. * * *

"Said party of the first part, by the aforesaid principal chief and delegates, and in consideration of the payment of the sum mentioned in the Act of March third, eighteen hundred and eighty-three aforesaid, as due under appraisement for Cherokee lands west of the Arkansas River, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these presents, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part forever in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land

lying and being in the Indian Territory embracing the following townships, and fractional townships, north and east of the Indian meridian. * * * "

Further evidencing the intention of the government to retain control over the mineral resources of the tribe, it is provided in the Act of Congress of June 28, 1906 (34 Stat. L. 539, 543), as follows:

"That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made, are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided,* that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; and *provided further,* that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *Provided, however,* that nothing herein contained shall be construed as affecting any valid existing lease or contract."

*This is the only form of alienation of these minerals possible under the law.*

In the seventh paragraph of section two of said Act of Congress of June 28th, 1906, it is provided:

"That nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the

tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided."

Section 4 of 1912 Act, 37 Stat. L. 86, provides same not affected. By section 1 of 1921 Act and the Act of 1929, 41 Stat. L. 1249 and 45 Stat. L. 1478, the mineral rights are reserved to the Osage tribe to 1959 or otherwise provided by Act of Congress.

In *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36, the Circuit Court of Appeals, Third Circuit, dealing with the right to tax the Osage Indians, said:

> "*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens (*Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Field*, 255 U. S. 257), any legislation by government imposing taxation on its dependent wards must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.
>
> "*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by government on its wards will not be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government. In support of this, reference is made to the *Quapaw Indians*, 34 Opinions Attorney General 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian;' and *Choate* v. *Trapp, supra*, where it is said: 'The construction, instead of being strict, is liberal. Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak

and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with *United States* v. *Rickert,* 188 U. S. 432, and *Elk* v. *Wilkins,* 122 U. S. 94, where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute, but did not pass upon the question as to whether Indians came within the purview of the statute.

In the case of *Chouteau* v. *Burnett,* 283 U. S. 691, 75 L. ed. 1353, there was involved the question as to whether or not the income of a member of the Osage tribe of Indians who had received his certificate of competency, and which income came from his interest in the mineral resources of the tribe, fell within the purview of the federal income tax law. The Supreme Court held that it did.

The question of the right of the state to impose a tax is disposed of in that case under the following language:

"Royalties received by the government from mineral leases of Indian lands have been held to be beyond a state's taxing power *(Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171; *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 72 L. ed. 709, 48 S. Ct. 333, *supra)* on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. * * * "

In the case of *Gillespie* v. *State of Oklahoma,* 257 U. S. 501, 66 L. ed. 338, reference is made to the case of *Pollock* v. *Farmers Loan and Trust Company,* 157 U. S. 429, 39 L. ed. 759. The reference goes to the proposition that where the principal is immune from taxation, the income derived from the principal is also immune from taxation. Dealing with the matter of taxing income received by lessees from restricted Indian land, the courts say that the lease is a governmental instrumentality by which the government fulfills its obligation toward the Indian, and, being a governmental instrumentality, is not subject to tax by the state.

It has been held that the leases held by various companies on restricted Indian land were not themselves subject to a tax. See the case of *C. O. & G. Ry. Company* v. *Harrison,* 59 L. ed. 234.

When the court held that these leases were not subject to ad valorem tax, the state then undertook to collect a tax on the income from the leases, and the *Gillespie* case held that, since the lease itself was not subject to a tax, a tax could not be placed against the income or profit from the lease. In the case of *Pollock* v. *Farmers Loan & Trust Company,* considerable attention was paid to this question by the Supreme Court, and, in that great history-making case, with reference to this particular question, the court said:

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from the land and the growth or produce of the land. Mr. Justice PATTERSON observed in *Hylton* v. *United States,* 3 U. S. 3 Dall. 171 (1:556), 'Land, independently of its produce, is of no value,'

and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus, in *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6:678, 687), it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice MARSHALL said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449 (7:48), it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice THOMPSON and Mr. Justice JOHNSON, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice MARSHALL delivering the opinion, overruled that contention.

"So, in *Dobbins* v. *Erie County Comrs.*, 41 U. S. 16 Pet. 435 (10:1022), it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy* v. *California*, 65 U. S. 24, How. 169 (16:644), it was held that a duty on a bill of lading was the

same thing as a duty on the article which it represented; in *Northern Cent. R. Co.* v. *Jackson,* 74 U. S. 7 Wall. 262 (19:88), that a tax upon the interest payable on bonds was a tax not upon the debtor but upon the security; and in *Cook* v. *Pennsylvania,* 97 U. S. 566 (24: 1015), that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia & S. M. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326 (30:1200), 1 Inters. Com. Rep. 308, and *LeLoup* v. *Mobile,* 127 U. S. 640 (32:311), 2 Inters. Com. Rep. 134, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the case at bar, the mineral interests of the Osage tribe of Indians is not subject to a tax; therefore, the interest that each individual allottee has in the tribe's mineral interests is not subject to a tax.

In the Indian cases the courts use the term "Federal Instrumentalities," but that is only for the purpose of showing that the source is non-taxable, and it does not differ from any other character of taxation such as is mentioned in the case of *Pollock* v. *Farmers Loan and Trust Company, supra.*

None of the statutes relating to the Osage Indians provides for a tax or authorizes a tax on personal property of members of the tribe, but do authorize taxes on certain real estate, exempting from taxes the homestead allotment of the allottee. It is entitled to cosideration that statutes are silent on the right to tax propery of members of the tribe other than real estate, but the statutes are not silent on the question that the personal property involved in this action is trust property until turned over to the allottee. They are not trust property by virtue of any independent act of the Secretary of the Interior, but they are trust

property by virtue of the laws with reference thereto. In construing statutes with reference to Indian matters, the requirement is that the construction shall be made which is most favorable to the Indian, and to that extent all legislation affecting Indians a different rule prevails than that which prevails with reference to the construction of other statutes.

In the case of *Elk* v. *Wilkins*, 112 U. S. 94, it is said:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and the Senate, or through Acts of Congress in the ordinary form of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

And in *Choate* v. *Trapp*, 224 U. S. 665, the Supreme Court of the United States said:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years and has been applied in tax cases.

"For example, in *Kansas Indians (Blue Jacket* v. *Johnson County)*, 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice DAVIS, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice MARSHALL who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning.' Again, in *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws."

The fact that the Osages have been granted citizenship under the Act of March 3, 1921, can have no effect on this question. See *United States* v. *Celestine*, 215 U. S. 278, 54 L. ed. 195, in which it is said:

"Notwithstanding the gift of citizenship, both the defendant and the murdered woman remain Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress

intended by the mere grant of citizenship, to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

See, also, *United States* v. *Nice*, 241 U. S. 591, 60 L. ed. 1192, in which it is said:

"As pointing to a different intention, reliance is had upon the provision that when the allotments are completed and the trust patents issued, the allottees 'shall have the benefit of and be subject to the laws, both civil and criminal, of the state' of their residence. But what laws was this provision intended to embrace? Was it all the laws of the state, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole, and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter. The Constitution invested Congress with power to regulate traffic in intoxicating liquors with the Indian tribes, meaning with the individuals composing them. That was a continuing power of which Congress could not divest itself. It could be exerted at any time and in various forms during the continuance of the tribal re-

lation and clearly there was no purpose to lay any obstacle in the way of enforcing the existing congressional regulations upon this subject, or of adopting and enforcing new ones, if deemed advisable.

"We recognize that a different construction was placed upon paragraph 6 of the Act of 1887, in *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, but, after re-examining the question in the light of other provisions in the act, and of many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled. Judgment reversed."

Section 7 of the Act of Congress of April 18, 1912 (37 Stat. L. 86), Barney's Osage Laws 63, contains the proviso:

"That nothing herein shall be construed so as to exempt any such property from liability for taxes."

In the case of *Hudson* v. *Hopkins,* 183 Pac. 507, the Supreme Court of the State of Oklahoma construed this provision as authorizing the taxation of the homestead allotments of deceased Osage allottees, but in the case of *United States* v. *Mullendore,* 35 F. (2d) 78, the Circuit Court of Appeals of the Eighth Circuit took the opposite view to what the Supreme Court of the state took, and held that the only purpose of that provision was to leave the taxability of Osage lands just the same as it was prior to the passage of that act. The reasoning will apply equally to this income.

There is no federal statute authorizing the state to tax any of the funds or moneys turned over to the individual members of the tribe derived from tribal sources. Without such express authority the state is powerless to impose the tax. See *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, hereinafter referred to. The only provisions are with reference

to real property. The source from which such income is derived is non-taxable, and, therefore, the income is non-taxable. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. ed. 338.

Section 5 of the Allotment Act (June 28, 1906), 34 Stat. L. 539, at page 545, reads as follows:

> "*Sec. 5.* That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys and mineral interests, except as hereinbefore provided."

This clearly shows the source to be non-taxable.

With reference to the right of the state to impose a tax on products of a mine on Indian lands, the Supreme Court of the United States, in the case of *C. O. & G. Ry. Co.* v. *Harrison*, 59 L. ed., page 234, held that such property was not subject to a tax. The syllabus in that case reads as follows:

> "The gross revenue tax imposed by Oklahoma Act of May 26, 1908, section 6, upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal produced, 'which shall be in addition to the taxes levied and collected upon an ad valorem basis upon such mining property and the appurtenances thereunto belonging,' is an occupation or privilege tax which can not be exacted from a federal instrumentality acting under congressional au-

thority, such as the corporate lessee, under the authority of the Curtis Act of June 28, 1898 (30 Stat. L. 495, chapter 517), of coal mines upon segregated and unallotted lands belonging to the Choctaw and Chickasaw Indian tribes."

And in the opinion, on page 237, the court says:

"It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty and to subject them to a uniform ad valorem tax, for it seems to us clear that the Act of 1908 provided no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We can not, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of the property liable to a general assessment—provision is made for determining that upon a different basis. *Meyer* v. *Wells, F. & Co.*, 223 U. S. 298, 301, 56 L. ed. 445, 447, 32 Sup. Ct. Rep. 218. The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require, but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. *Pullman Co.* v. *Knott*, decided at the present term (235 U. S. 23, *ante* 105, 35 Sup. Ct. Rep. 2)."

In *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, 66 L. ed. 338, the Supreme Court of the United States, in dealing with the power of the state to collect a gross production tax on oil produced in Osage County, held that the state was without authority to impose such tax. Paragraph one of the syllabus reads as follows:

"A state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage In-

dian lands from sales of his share of oil and gas received under his leases."

In that case the court approved of the principles laid down in the case of *C. O. & G. Ry. Co.* v. *Harrison, supra,* and applied the same principle to the production of oil in Osage County. In the opinion, on page 341, the court says:

> "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if a part of it comes from such a source, the tax is *pro tanto* void *(Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912)—a rule lately illustrated by *Evans* v. *Gore,* 253 U. S. 245, 64 L. ed. 887, 11 A. L. R. 519, 40 Sup. Ct. Rep. 550, and applied in a case somewhat like the present by the Supreme Court of Hawaii *(Oahu R. & Land Co.* v. *Pratt,* 14 Haw. 126). Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the profits of the leases, and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms that it can for its wards. *Weston* v. *Charleston,* 2 Pet. 449, 468, 7 L. ed. 481, 488. The taxation of cattle grazing on Indian lands held valid in *Thomas* v. *Gray,* 169 U. S. 264, 273, 42 L. ed. 710, 714, 18 Sup. Ct. Rep. 340, obviously is more remote. As a writ of error lies in this case, the petition for *certiorari* that was presented for greater caution will be denied. *Dahnke-Walker Mill Co.* v. *Bondurant,* December 12, 1921 (257 U. S. 282, *ante,* 239, 42 Sup. Ct. Rep. 106)."

In the recent case of *Jaybird Mining Company* v. *Weir,* 271 U. S. 609, 70 L. ed. 1112, the state undertook to tax ore that had been mined from restricted Indian land and was

stored in a bin until such time as it should be sold. The Supreme Court of the United States held that the same was not taxable, on the theory that the attempt to tax would be to tax the federal agency. Paragraph three of the syllabus in that case reads as follows:

> "Ore in possession of a lessee, which was taken from restricted property of a Quapaw Indian leased by the Government for development, from which the interests of the Indian have not been segregated, is not subject to state taxation."

In the opinion, at page 1114, the court says:

> "The Quapaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the acts referred to. It is the duty and established policy of the government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. *United States* v. *Noble*, 237 U. S. 74, 59 L. ed. 844, 35 Sup. Ct. Rep. 532; *Goodrum* v. *Buffalo*, 89 C. C. A. 525, 162 Fed. 817. The lessee is an agency or instrumentality by the government for the development and use of the restricted land and to mine the ores therefrom for the benefit of its Indian wards. *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. *It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And, without congressional consent, no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.' *Johnson* v. *Maryland*, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see *Farmers and M. Bank* v. *Minnesota*, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; *Choctaw O. & G. R. Co.* v. *Harrison, supra; Gilles-*

*pie* v. *Oklahoma*, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rep. 171." (Italics ours.)

The case of *McCurdy, County Treasurer*, v. *United States*, 246 U. S. 263, 62 L. ed. 706, is not authority for the tax in this case. In that case, trust funds were paid to the allottee under the provisions of the Act of Congress of April 18, 1912 (37 Stat. L. 86), which provides in section 5 thereof that the Secretary of the Interior may, in his discretion, pay to members of the tribe all or part of their funds in the Treasury of the United States; provided, he shall first be satisfied by the competency of the allottee or that the release of the same would be for the best interest of such member, but there is no provision giving the Secretary control over the fund after it is paid over to the member. Under this act, a part of the funds held in trust for Robert Panther, an Osage allottee, were first turned over to a trustee for Robert Panther, and later by such trustee to Panther, with which funds he purchased a home in the City of Pawhuska, and which home at the time of its purchase was subject to taxation. The Supreme Court in that case held that the fund having been released to the Indian under the Acts of Congress, and then later by him used in the purchase of a home, that the fact that there was a recital in the deed to the effect that the land could not be sold or encumbered without the approval of the Secretary of the Interior would not have the effect of relieving such land from taxation. There was no attempt on the part of the state to tax the money. It was only an attempt to tax already taxable real property in which money had been invested, and, if there were no restrictions placed on the money after it was turned over to Panther, then when he invested it in taxable property, the property still remained subject to taxation. It cannot be said that

this decision is in any way controlling in the controversy here.

Nor is the case of *A. S. J. Shaw, State Auditor,* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 578, 72 L. ed. 709, authority for the tax in this case. The facts in that case are that the defendant took an oil and gas lease from a full-blood Creek Indian on the land which was purchased for said Indian by the Secretary of the Interior out of oil and gas royalties received by said Indian from restricted lands. The Secretary of the Interior admitted that this land, bought for this Indian, was subject to an ad valorem tax, and as a consequence, paid the taxes for such Indian on such land out of the funds of the Indian. It was contended by the oil company that, notwithstanding the taxability of the land itself, it was a federal agency through which the government of the United States was carrying out its duty toward the Indian in question and, therefore, was not subject to taxation. The court held that it was not such a federal agency and that, therefore, it was subject to the tax sought to be imposed by the State of Oklahoma. The court held, *first,* that the land was subject to taxation, because it was not allotted land and no authority was given by Congress to withdraw such land from taxation, and, *second,* that the tax claimed against the oil corporation was not an attempt to tax a federal agency or instrumentality. Evidently the state had no power to tax money that was used for the purchase of this land for the Indian, but the investment of the same in taxable real property did not withdraw such property from state taxation without there being some specific declaration in the Act of Congress to that effect.

***Status of petitioner so far as the income in question is concerned is the same as a member of the tribe without a certificate of competency.***

The petitioner is a member of the Osage tribe of Indians duly enrolled as such under the Act of Congress of June 28, 1906. At the time of the passage of said act, his status as an Indian was the same as every other member of the Osage tribe regardless of the quantum of blood—in fact no distinction was made between members of the tribe on the question of the quantum of blood until the Act of Congress of March 3, 1921, which will be hereinafter referred to.

There was a provision in the Act of Congress of June 28, 1906, for the granting of what is called a "certificate of competency" to members of the Osage tribe of Indians by the Secretary of Interior upon application of said Indians provided the Secretary of the Interior found the applicant fully competent and capable of transacting his or her own business and caring for his or her own affairs. Said provision is the seventh paragraph of section 2 of the Act of Congress of June 28, 1906 (34 Stat. L. 539), and reads as follows:

> "That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded to him by reason of this act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; *provided*, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead)

shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; *provided,* that the surplus lands shall be non-taxable for the period of three years from the approval of this act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; and *provided further,* that nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; and *provided, further,* that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It will be noted that the privilege granted by such certificate of competency was that the Indian was permitted to sell and convey any of the lands deeded him by reason of said act except his homestead, and that was the extent of the difference between a member of the tribe who was granted a certificate of competency and one who was not—in all other matters, they were the same.

The question as to the effect of the granting of a certificate of competency was before the Supreme Court of Oklahoma in the case of *Neilson* v. *Alberty,* 36 Okl. 490, 129 Pac. 847. In passing upon the question of the effect of the granting of a certificate of competency, the court said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Invest-*

*ment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 656, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the statute authorizing the issuance of certificate of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

And this construction has been followed by that court ever since.

The Act of April 18, 1912 (37 Stat. L. 86), section 3, gives the County Courts of Oklahoma jurisdiction in probate maters to appoint guardians and administer all estates of the allottees of said tribe without regard to the facts as to whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

Section three of said act reads as follows:

"*Sec. 3.* That the property of deceased and of or-

phan minor, insane or other incompetent allottees of the Osage tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma, but a copy of all papers filed in the County Court shall be served on the Superintendent of the Osage Agency at the time of filing, and said Superintendent is authorized, whenever the interests of the allottees require, to appear in the County Court for the protection of the interests of the allottee. The Superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the County Court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety as the County Court shall determine. Every bond of the executor, administrator, guardian or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto; *provided*, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said mi-

nor is being wasted or misused by such parents; *provided, further*, that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior."

It will be noticed that this act makes no distinction between those members of the tribe that have a certificate of competency and those that do not have the same. If the petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend and control a proceeding instituted by or against him in the County Court of Oklahoma? Prior to the passage of this act the state courts had no jurisdiction over an Osage Indian estate.

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *provided,* that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Prior to this enactment, an Osage could not made a valid will nor can he now, without the approval of the Secretary of the Interior, even though he has a certificate of competency.

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood. Congress in the exercise of its power could legislate the same way with reference to Indians of less than half blood.

Section 5 of this act is as follows:

> "No person convicted of having taken or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indian any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *provided,* that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with the petitioner, he being an Osage Indian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

—*Ramsey* v. *United States,* 271 U. S. 468, 70 L. ed. 1039;

*In re Dennison,* 38 F. (2d series) 662.

The question of the status of members of the tribe has been before the Federal District Court and the Supreme Court of the United States. In the case of *LaMotte & LaMotte* v. *United States,* 254 U. S. 570, 65 L. ed. 410, and dealing with the status of members of the Osage tribe, the Supreme Court used this language:

"The Osages have not been fuly emancipated but are still wards of the United States."

This quotation, of course, referred to members of the tribe having certificates of competency for, in that case, there was no contention that an Indian of the Osage tribe who did not have a certificate of competency was not fully and completely under the control and jurisdiction of the United States.

In the more recent case of the *United States* v. *John Ramsey and Wm. K. Hale,* 271 U. S. 468, 70 L. ed. 1039, the Supreme Court of the United States had before it the question of validity of an indictment against John Ramsey and Wm. K. Hale, both white men who were charged with the murder of Henry Roan, a full-blood Osage Indian who had a certificate of competency. The murder was alleged to have been committed on an allotment belonging to another member of the Osage tribe of Indians who did not have a certificate of competency. It was the contention of the counsel for Ramsey and Hale that the United States did not have jurisdiction of the case because, *first,* that the land where the homicide was committed was not Indian country and, *second,* because the United States no longer had jurisdiction of the offenses of this character committed in Osage County, Oklahoma. This involved the question not only of the status of the land but of the status of the members of the Osage tribe of Indians. The fact that Henry Roan had a certificate of competency was not given any consideration by the Supreme Court, but the case was considered from the standpoint of the federal statutes with reference to the offenses committed in Indian country, the court holding that the allotment in question was Indian country because it was still subject to supervision and control of the Secretary of

the Interior; also, under the statute which makes it a violation of the federal law in a state to kill an Indian in Indian country within the limits of the state. The court held the indictment to be good and directed the trial of Ramsey and Hale in the federal courts. In discussing the question of the status of the Indians in the opinion, the court said:

> "But the authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before (*Donnelly* v. *United States*, 228 U. S. 243, 271, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913-E, 710), in virtue of the long settled rule that such Indians are wards of the Nation in respect of whom there is devolved upon the Federal Government, 'the duty of protection, and with it the power' (*United States* v. *Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109). The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the Nation (*United States* v. *Osage County*, 251 U. S. 128, 133, 64 L. ed. 184, 187, 40 Sup. Ct. Rep. 100; *United States* v. *Nice*, 241 U. S. 591, 598, 60 L. ed. 1192, 1195, 36 Sup. Ct. Rep. 696), and it rests with Congress alone to determine when that relationship shall cease (*Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rep. 506; *United States* v. *Celestine*, 215 U. S. 278, 290, 54 L. ed. 195, 199, 30 Sup. Ct. Rep. 93)."

The District Court of the United States for the Western District of Oklahoma in *Quarles* v. *Dennison*, 38 Fed. (2d) 662, in a bankruptcy case involving an Osage Indian with a certificate of competency, in paragraphs one and two of the syllabus states the status of the bankrupt as follows:

> "A 'competent' Osage Indian is one having certificate of competency which gives him certain rights as to disposal of his property.

"Under Osage Allotment Act (Act June 28, 1906, 34 Stat. 539) and amendments thereto, Act of March 3, 1921, 41 Stat. 1249, and Act of March 2, 1929, 45 Stat. 1478, an Osage Indian of less than half blood with certificate of competency, or with restrictions removed, does not have right to dispose of his trust fund or his trust estate."

And, in the opinion in the case with reference to the status of the bankrupt, the court said:

"Counsel for the trustee insist in their brief that a member of the Osage tribe of less than half blood, who has received a certificate of competency, has all the rights of a white man, and that he can dispose of any of his property. I cannot agree with the learned counsel, nor do I find any decisions which were cited in their brief to justify that contention. A member of the tribe receiving a certificate of competency could, prior to the Act of March 3d, 1921, dispose of any property which he had, including his surplus land, but could not dispose of his homestead during the trust period.

"Section 3 of the Act of March 3d, 1921 (41 Stat. 1249), gave to an Osage Indian of less than half Indian blood the additional right to dispose of his homestead, but no power was given in this act or any other act to dispose of or incumber in any way his interest in the trust estate."

A fair construction of the various Acts of Congress with reference to the Osage tribe of Indians will disclose that Congress has been very slow in relieving itself of its duties and obligations toward the tribe and its members or as has been said "slow in emancipating them." It has granted to certain members certificates of competency authorizing such members to do certain things without being controlled by the United States; it has declared all members

of the tribe to be citizens of the United States, but has specifically reserved to the Government the control and management of the tribe's affairs; it has given to the County Courts of Oklahoma jurisdiction with reference to the estates of deceased members of the Osage tribe of Indians, and with reference to guardianships, with certain limitations and restrictions. For instance, it has provided that copies of all papers must be served upon the Superintendent of the Osage tribe of Indians, and this has been held to be a condition precedent to the County Court obtaining jurisdiction over Osage estates or to act on the same.

In the case of *In re Guardianship of Winnett: Wright, Superintendent,* v. *Riber, et al.,* 112 Okl. 43, 239 Pac. 603, the Supreme Court of Oklahoma held that the Superintendent of the Osage Agency is a necessary party to the proceedings and is entitled to notice. In the opinion, the court says:

> "The Superintendent is therefore a necessary party to the action so far as the notice of its pendency is concerned, and his plea to the jurisdiction of the court and to the hearing being had on the date the petition was filed was proper and timely."

In the case of *In re Pitts: Wright, Superintendent,* v. *Citizens Trust Company,* 115 Okl. 116, 242 Pac. 1036, the Supreme Court of Oklahoma held that it was necessary for copies of all papers in guardianship matters to be filed with the Superintendent of the Osage Agency as required by Act of Congress of April 18, 1912, before the court could acquire jurisdiction. In the opinion, the court says:

> "The first proposition presented by the appellant is that the Superintendent of the Osage Agency is a necessary party to every proceeding in the County

Court respecting the property of a deceased or orphan minor, insane, or other incompetent allottees of the Osage tribe of Indians, and that, as it is admitted, no notice of the application of the Citizens Trust Company, guardian, was had upon the Superintendent of the Osage Agency, the County Court was deprived of jurisdiction to make the order complained of and the District Court of Osage County was without jurisdiction to approve the said order of the County Court."

It has also provided that guardians for members of the Osage tribe of Indians of one-half or more Indian blood, whether they had certificates of competency, or not, could not be appointed without the approval of the Secretary of the Interior. In section one of the Act of February 27, 1925 (43 Stat. 1008), is found this language:

"No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage tribe of Indians who does not have a certificate of competency, *or who is of one-half or more Indian blood.*"

It is also provided in section 1 of said act:

"All payments to legal guardians of Osage Indians shall be expended subject to the joint approval in writing of the court and the Superintendent of the Osage Agency."

Prior to authorizing the County Courts of Osage County and Oklahoma, to assume jurisdiction in these matters, the courts had no jurisdiction over the affairs of the Osage tribe of Indians, and all the affairs of the Osage tribe of Indians were subject to disposal by the Secretary of the Interior whose duty it was, prior to authorizing the courts to settle estates, to determine the

heirs and settle the estates of the deceased members of the tribe. This petitioner cannot make a valid will with reference to his property without the approval of the Secretary of the Interior under the Act of Congress of April 18, 1912, hereinbefore referred to. How it can be said that the status of this petitioner is that of a white man, or that he is no longer a ward of the government is beyond comprehension in view of the various Acts of Congress and the various decisions of the courts with reference thereto.

Under the Act of Congress of April 12, 1924 (43 Stat. L. 94), it is provided "that any right to, or interest in, the lands, monies, or mineral interests as provided in the Act of Congress approved June 28, 1906, entitled 'an act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes,' and acts amendatory thereof or supplemental thereto, vested in, determined or adjudged to be the right or property of any person not an Indian by blood may with the approval of the Secretary of the Interior and not otherwise be sold, assigned and transferred under such rules and regulations as the Secretary of the Interior may prescribe." Congress here definitely provided a means for those of non-Indian blood, who inherited or received by will property of members of the Osage tribe of Indians to sell or dispose of the same subject to the approval of the Secretary of Interior and not otherwise. This Act of Congress further demonstrates the status of a member of the tribe having a certificate of competency with reference to his part in the tribal property. It is a well established principle of law that, where there is an act of this kind authorizing certain classes to do certain things, it has the effect of preventing other

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classes not given this privilege from doing the same thing and clearly demonstrates that no member of the tribe whether with or without a certificate of competency could in anywise sell or dispose of his interest in the tribal property.

The opinion in the case of *Taylor* v. *Tayrien*, 51 F. (2d) 884, goes direct to the proposition of the status of a member of the Osage tribe of Indians having a certificate of competency with reference to his so-called headright or mineral interests, and on page 890 thereof, the court says:

> "*(8)* It is also plain that while Congress has found apt words to free from restrictions the surplus allotments of some Indians and the homesteads of others, it has refrained from the use of any such language as to headrights, except in the one case of non-Indian owners, and then only with the approval of the Secretary. When we start with a situation where no one of these classes of property — surplus, homestead, and headrights—is alienable, and **where** by the gradual process of legislation, first one class (surplus) is freed from restrictions in the hands of certain tribal members; and later another class (homesteads) is freed in the hands of other members; and still later the third class (headrights) is freed in the hands of non-Indians; in such a situation it seems impossible to say that Congress intended the third class to be alienable by any other person than the non-Indian specifically covered. Moreover, it has long been the policy of this government to construe statutory language in favor of the Indians. In *Choate* v. *Trapp*, 224 U. S. 665, 675, 32 S. Ct. 565, 569, 56 L. ed. 941, the court said: 'But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'."

This opinion is rather long and is a very complete analysis of the federal statutes with reference to the Osage tribe of Indians and particularly concerning the matter of the status of a member of the tribe with a certificate of competency and with reference to the so-called headright.

This court in the case of *DeNoya* v. *Arrington, Executor* (not yet officially reported); 20 P. (2d) 563, 568, found in December 16th, 1932, issue of the Oklahoma Appellate Court Reporter on page 541, gave an extensive review of the federal statutes and quoted at length with approval from the case of *Taylor* v. *Tayrien, supra.*

***Chouteau* v. *Burnett.***

Much stress was put upon the case of *Chouteau* v. *Burnett,* 283 U. S. 691, 75 L. ed. 1353, in the lower court, but this case is not applicable in any way to the issues here. It was strictly a federal case in which the court held that Congress had the right to tax the income of an Osage Indian if it saw fit to do so and that the income tax statute was sufficiently broad to include the income of a member of the Osage Tribe of Indians with a certificate of competency; but the Supreme Court, as stated in *Jaybird Mining Company* v. *Weir, supra,* has distinctly held that the United States could impose a tax on its own instrumentalities, and the fact that it did so did not mean that the state could impose a tax.

## Conclusion.

In conclusion, we refer to the dissenting opinion of the Honorable EDWIN R. MCNEILL, Chief Justice of the Supreme Court of the State of Oklahoma (R. 35), and the reasoning and authorities supporting same and deem it unnecessary to reiterate what the court has said and respectfully submit that the majority opinion of the Supreme Court of the State of Oklahoma is in error in not requiring the State Treasurer to return the funds sued for in this case, and that the judgment should be reversed for the reasons, as we believe, that the mineral rights reserved to the Osage tribe of Indians, and the income received therefrom from oil and gas leases, is a federal instrumentality for the protection of the dependent wards of the government, and that a tax against the members of the tribe upon the income from said mineral resources amounts to the imposition of a tax upon the mineral rights of the Osage tribal property, and that it is beyond the power of the State of Oklahoma to impose such a tax.

Respectfully submitted,

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# In the Supreme Court of the United States

October Term, 1935.

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## No. 599

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EDWARD A. LEAHY,

*Petitioner,*

vs.

STATE TREASURER OF OKLAHOMA, RAY O. WEEMS, as STATE TREASURER, OKLAHOMA TAX COMMISSION, MELVEN CORNISH, W. D. HUMPHREY, and JOHN T. BAILEY, as Members of the OKLAHOMA TAX COMMISSION,

*Respondents.*

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## Brief of Respondents

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*Respondents.*

## Brief of Respondents

### PRELIMINARY STATEMENT

The petitioner is a member of the Osage Tribe of Indians, to whom a Certificate of Competency was issued by the Secretary of the Interior on the 24th day of May, 1934.

During the year 1932, he received as a member of such tribe, a certain amount as his pro rata share of the funds derived from the sale of minerals belonging to the tribe. On this income, the State of Oklahoma levied an income tax. The Supreme Court of the State sustained the tax: *Leahy* v. *State Treasurer of Oklahoma, et al.*, 49 Pac. (2d) 570.

## ARGUMENT

It is the contention of the petitioner that the income herein involved is immune from State taxation for the reason that the mineral rights are reserved to the tribe under the Osage Allotment Act of June 28, 1906.

It is admitted by the pleadings that petitioner was issued a certificate of competency by the Secretary of the Interior on the 24th day of May, 1924, and that he held such certificate at the time he received the income in question. This certificate was issued to him under the authority of the Act of Congress of June 28, 1906 (34 *Stats. at L.* 539), which provides:

> "The Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded to him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; provided, that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise

provided by Congress; and provided further, that nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved for the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: and provided further, that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It is our contention that the issuance of this certificate was in effect a removal of restrictions on the land of petitioner except as to the sale of his homestead and headright, and was a removal of restrictions upon him as to the fund herein involved, and that petitioner after receiving such certificate was entitled to receive his pro rata share of the trust fund belonging to the tribe free from all restrictions and control by the Federal government.

It was the duty of the Secretary of the Interior to pay such funds to him in quarterly payments under Section 4 of the Act of Congress of March 3, 1921, 41 *Stats. at L.* 1250, which provides:

"That from and after the passage of this Act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency

> $1,000 quarterly except where incompetent adult members have legal guardians, in which case the income of such incompetents shall be paid to their legal guardians, and to pay for maintenance and education to the parents or natural guardians or legal guardians actually having minor members under twenty-one years of age personally in charge $500 quarterly out of the income of said minors all of said quarterly payments to legal guardians and adults, not having certificates of competency to be paid under the supervision of the superintendent of the Osage Agency, and to invest the remainder after paying all the taxes to such members either in United States bonds or in Oklahoma State, county, or school bonds, or place the same on time deposits at interest in banks in the State of Oklahoma for the benefit of each individual member under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year: Provided Further, That all just existing individual obligations of adults not having certificates of competency outstanding upon the passage of this Act, when approved by the Superintendent of the Osage Agency, shall be paid out of the money of such individual as the same may be placed to his credit in addition to the quarterly allowance provided for herein."

Upon the passage of the Acts above referred to, petitioner was completely and fully emancipated as to this fund. The quarterly payments provided for by the Act were not paid to him as a ward of the government but were paid to him as a matter of right. The Federal government had no discretion in the matter. It could not

withhold such payments nor could it control the manner in which such fund was used or invested by him. It was, therefore, subject to State taxation. In this view we are supported by the case of *Chouteau* v. *Burnet,* (C. C. A. 10), 38 Fed. (2d) 976. In the last paragraph of the headnotes, the gist of the decision is stated as follows:

> "Where taxpayer was member of Osage Tribe and tribal lands were allotted to him under Osage Allotment Act, June 28, 1906 (34 Stat. 539), and his gross income for years in question was his pro rata share from tribal mineral leases given with approval of secretary under statute, and in addition to his own allotments he was owner by inheritance of land allotted to another member of tribe, and he had applied for and received certificate of competency provided for by Act of June 28, 1906, Sec. 2, par. 7 (34 Stat. 542), he was liable for income tax under Revenue Act 1918 (40 Stat. 1057), and Revenue Act 1921 (42 Stat. 227), since certificate of competency bestowed upon him unrestricted management of his affairs and gave him full power to use and dispose of his property according to his own judgment."

In the discussion of the case after citing the Acts of Congress hereinabove referred to, the court said:

> "Apparently the purpose of the statute in authorizing the certificate and its subsequent issuance was to fully emancipate the Indian receiving it from further Governmental control and supervision of his property, except his homestead. Chouteau's gross income for the three years was wholly his pro-rata share of royalties and bonuses on the mineral produced for those years. His certificate of competency bestowed upon him unrestricted management of his affairs and gave him full power to use and dispose of his property according to his own judgment.

> Thereafter his pro-rata share in the mineral production was paid to him not as a ward of the Government. It was paid to him under the terms of the Act, but was not a Governmental instrumentality and means to gradually bring him to a state of competency and independence. By provision of the Act it was determined that he was competent to have exclusive management of his own affairs when the certificate was issued to him. He obtained it at his request and with the Government's consent and approval, and thereupon he assumed the same burdens that the law imposes on every other individual property owner. We think his civil status thus fixed brought him within the terms of the income tax statutes. As to him the ruling of the Board of Tax Appeals is therefore affirmed."

This case was on appeal affirmed by the Supreme Court of the United States, *Choutcau* v. *Burnet*, 283 U. S. 691. It is there said:

> "The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. His share of the royalty from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that as respects his property other than his homestead his status is not different from that of any citizen of the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. (Compare United States v. Waller, supra). It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his

> untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute. Work v. Mosier, 261 U. S. 352; Work v. Lynn, 266 U. S. 161. The claim that with respect to this income the petitioner was restricted, and therefore exempt from the tax laid by Sections 210 and 211 (a) must fail."

Petitioner contends that this case is not controlling for the reason that the question there involved was the right of the Federal government to levy and collect a Federal income tax on the income derived from the mineral resources of the tribe, that the Federal government had a right to levy such tax because it has the right and power to tax its own agency or instrumentality if it chooses so to do, but that the State cannot do so unless granted that right by Congress. We think petitioner misconstrues the effect of the holding in that case. The right to levy and collect the tax was not sustained on the theory that it was a tax by the Federal government upon its own instrumentality, and that the Government had a right to levy such tax, but was sustained on the theory that the certificate of competency issued to the Indian in that case had the effect to completely emancipate him as to trust funds received by him under the Act, and that such fund was for that reason subject to the tax. The court in that case speaking of the status of an Osage Indian who had received a certificate of competency said:

> "His share of the royalties from oil and gas leases was payable to him without restriction upon his use of the funds so paid. It is evident that as respect to his property other than his homestead, his

status is no different from that of any citizen of the United States. * * *

It is further insisted that since the royalties are not taxable, so long as they remain in the hands of the government in trust for the tribe and undistributed to members, income derived by the individual member from this fund comes from an exempt source and must therefore also be held to be exempt. (See Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601.) Royalties received by the government from mineral leases of Indian lands have been held to be beyond a State's taxing power (Gillespie v. Oklahoma, 257 U. S. 501; Shaw v. Oil Corp., 276 U. S. 575) on the ground that, while in the possession of the United States they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax. The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter. Heiner v. Colonial Trust Co., 275 U. S. 232; Shaw v. Oil Corp., supra. But whatever may have been the liability of the fund to federal taxation while it remained in the hands of the government, *it cannot properly be said that the share of it paid as royalties to the petitioner constituted in his hands an instrumentality of the government and was therefore beyond the scope of the tax.* (Compare McCurdy v. United States, 246 U. S. 263). There is, therefore, nothing in the nature of the income which excepts it from the effect of sec. 213(a) of the Revenue Act of 1918." (Italics ours).

Applying the above statement of the Court to the facts in the case at hand, the money received by petitioner as his share of the royalties, does not constitute in his hands an instrumentality of the Federal govern-

ment; and the State of Oklahoma had the undoubted right to assess an income tax against the same.

Petitioner relies on the cases of:

*Gillespie* v. *Oklahoma,* 257 U. S. 501, 66 L. ed. 338;

*Shaw* v. *Gibson-Zahnizer Oil Corp.,* 276 U. S. 575, 72 L. ed. 709;

*Jaybird Mining Co.* v. *Wier,* 271 U. S. 609, 70 L. ed. 1112,

and kindred cases, to sustain his contention that the tax in question is a tax upon a governmental instrumentality. In all of these cases there was an attempt by the State to tax mineral lessees of restricted Indian land either by a direct tax on the lease itself or a tax on the income derived therefrom. This Court held that such tax tended to interfere with the policy of the Government in fulfilling its duty to restricted Indians and was, therefore, a tax on a federal instrumentality, and that the State had no right to levy such tax. The reasoning of these cases does not apply to the case at bar. The fund here sought to be taxed is unrestricted and the levying of the tax therefore in no wise interferes with the policy of the Federal government in fulfilling its duty to the Indians or Indian tribe. As before stated, petitioner was not paid his proportionate share of this trust fund as a ward of the government, and a tax levied thereon by the State in no manner tends to interfere with the policy of the Government in relation thereto. It, therefore, cannot be said to be a tax on a federal instrumentality. We think the case of *McCurdy, County Treasurer of Osage County* v. *United States,* 246 U. S. 263, is in point in this case. It is there said:

"The Acts of June 28, 1906, c. 3572, 34 Stat. 539,

> and April 18, 1912, c. 83, 37 Stat. 86, respecting the Osage Indians, do not authorize the Secretary of the Interior to impose restrictions upon private land purchased for a non-competent Osage allottee with his trust money, previously released under Sec. 5 of the latter act, and thus exempt it as a governmental instrumentality, during such restraint from the power of the State of Oklahoma to tax it and to sell it for the collection of such taxes. United States v. Rickert, 188 U. S. 432, distinguished."

In the case of *Fox Film Corp.* v. *Doyal, et al.*, 286 U. S. 123, this Court held that a tax on income derived from copyrights was not immune from State taxation on the ground that the same constituted a tax on a federal instrumentality. In discussing the question, the Court said:

> "The principle of immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (McCulloch v. Maryland, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' Indian Motorcycle Co. v. United States, 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (Johnson v. Maryland, 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any influence upon the exercise of the functions of government.' Willcuts v. Bunn, 282 U. S. 216, 225."

What is there said applies to the tax in the instant case and since the tax levied does not constitute a direct

burden upon any governmental instrumentality, it was within the power of the State to levy the tax. Petitioner also relies on the holdings announced in the case of:

*Choate* v. *Trapp*, 224 U. S. 665, 56 L. ed. 941,
and
*Carpenter* v. *Shaw*, 280 U. S. 363.

In these cases the State sought to tax the unrestricted lands of Choctaw and Chickasaw Indians under the Act of Congress of May 27, 1908 removing restrictions and authorizing taxation of the land. The court held the land not subject to taxation because of the tax-free provision of the Atoka agreement under which the land was allotted. This agreement provided that the land when allotted to these Indians in severalty should remain free from taxation for a period of twenty-one years or during the life of the allottee, or so long as the title of the land remained in the original allottee. The Supreme Court held that this provision of the agreement amounted to a property right, a vested right, and could not therefore be abrogated by Congress; that the subsequent Act of Congress authorizing the taxation of this land within the twenty-one year period destroyed a vested right of the allottee, and that the Act was for this reason unconstitutional and void. The holding in these cases has no bearing on the facts herein involved. There was no treaty entered into between the Government and the Osage tribe of Indians that the land allotted to the members of such tribe should be free from taxation for any period of time. It is true certain restrictions were by Congress placed upon the sale of the land, the mineral rights and the funds derived from the sale thereof but Congress had the power to remove these restrictions or any of them. In

the case of *Choate* v. *Trapp, supra,* the Supreme Court said:

> "The removal of restrictions on alienation of Indian allotments falls within the power of Congress to regulate Indian affairs but the provision of non-taxation is a property right and not subject to action by Congress."

It is our contention that Congress under the Acts of June 28, 1906 and March 3, 1921, removed all restrictions of petitioner as to the funds herein involved, and that such funds by reason thereof became subject to State taxation.

Petitioner also calls attention to the fact that under specific Acts of Congress no member of the Osage tribe of Indian blood can sell or dispose of his headright even though he has received a certificate of competency, and that such headright is not subject to taxation by the State even as against one holding such certificate. He then asserts that since the headright itself is immune from State taxation the income derived therefrom is likewise immune. In our opinion, a complete answer to this contention is: That Congress had the power to remove restrictions from the income derived from the headright without removing the same as to the sale of the headright itself. This under the holding of this Court in the case of *Chouteau* v. *Burnet, supra,* Congress did, and the income involved is, therefore, subject to the tax.

It is true that the trust funds belonging to the members of the tribe who have received a certificate of competency are collected, handled and distributed to such Indians as well as the funds belonging to the non-competents. This is true because they are tenants in common or joint owners of the funds, which funds are col-

lected and handled as to both competents and non-competents by the Federal government in their entirety. There is no practical method of collecting, handling and distributing these funds separately to competents and non-competents. There is no method or means provided by which such funds can be held separately, but the mere fact that the funds are so handled does not render the State tax on the income derived therefrom by one who has received a certificate of competency a tax upon a Federal instrumentality.

Petitioner has been completely emancipated as to the fund involved, and it is, therefore, subject to the State tax.

Judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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*of Counsel.*

# SUPREME COURT OF THE UNITED STATES.

No. 599.—October Term, 1935.

Edward A. Leahy, Petitioner, *vs.* State Treasurer of Oklahoma et al. } On Certiorari to the Supreme Court of Oklahoma.

[March 2, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

Leahy brought this action in a court of Oklahoma against the State Treasurer and others to recover $11.99 paid under protest as state income tax. He is a duly enrolled member of the Osage Tribe of Indians, and has long held a certificate of competency. As such member he is entitled to receive, from time to time, his pro rata share of the income of the restricted mineral resources of the Tribe held by the United States for the Tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539, and later legislation. The tax challenged is upon such income paid to him. Leahy claims that it is void because laid by the State upon a federal instrumentality. The trial court overruled the contention and entered judgment for the defendants. On the authority of *Choteau* v. *Burnet*, 283 U. S. 691, its action was affirmed by the Supreme Court of the State, three judges dissenting. — Okla. —. We granted certiorari because of the constitutional question presented. 296 U. S. —.

The facts are substantially the same as those presented in *Choteau* v. *Burnet, supra,* which upheld a federal income tax on a like payment. The applicable statutes and decisions are discussed there. As Leahy was entitled to have the income paid to him and was free to use it as he saw fit, no reason appears why it should not be taxable also by the State.

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*